NO. 6126

United States
Circuit Court of Appeals
For the Ninth Circuit

UNITED STATES OF AMERICA,

Appellant,

vs.

FRANCES MACKINNON PUSEY, GEORGE G. MACKINNON, WILLIAM H. MACKINNON, JR., FRANCES MACKINNON COIT and JOHN S. DELANCEY, Guardian of JOHN MACKINNON DELANCEY, a Minor,

Appellees.

Transcript of Record

Upon Appeal from the United States District Court for the Northern District of California, Southern Division.

The James H. Barry Co., San Francisco

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INDEX.

NAMES AND ADDRESSES OF ATTORNEYS OF RECORD

George J. Hatfield, United States Attorney; Chellis M. Carpenter, Esq., Assistant United States Attorney, Post Office Building, San Francisco, California, Attorneys for Plaintiff.

Carey Van Fleet, Esq., 640 Mills Building, San Francisco, California, Attorney for Defendants.

In the District Court of the United States for the Northern District of California, Southern Division.

IN EQUITY
No. 1826

AT LAW
No. 18342-K

UNITED STATES OF AMERICA,

Plaintiff,

vs.

FRANCES MACKINNON PUSEY, GEORGE G. MACKINNON, WILLIAM H. MACKINNON, JR., FRANCES MACKINNON COIT and JOHN *S.* DELANCEY, a Minor,

Defendants.

COMPLAINT

The plaintiff by its attorney, George J. Hatfield, United States District Attorney, for its cause of action alleges and says:

I.

That at all times hereinafter mentioned, the plaintiff was and now is a corporation sovereign and body politic.

II.

That this is a suit in equity of a civil nature arising under a law of Congress providing for internal revenue.

III.

That the defendant Frances Mackinnon Pusey is a citizen of the United States and an inhabitant of the State of California residing at Piedmont in said State and within the jurisdiction of this court; that the defendant George G. Mackinnon is a citizen of the United States and an inhabitant of the State of California residing at Oakland in said State and within the jurisdiction of this court; that the defendants William H. Mackinnon, Jr., and Frances Mackinnon Coit, are citizens of the United States and inhabitants of the State of California residing at Piedmont in said State and within the jurisdiction [1] of this court; that the defendant John S. Delancey, guardian of June Mackinnon Delancey, a minor and heir at law of the decedent, William H. Mackinnon, is a citizen of the United States and an

inhabitant of the State of California residing at Oakland in said State and within the jurisdiction of this court.

IV.

That on or about the 16th day of January, 1921, William H. Mackinnon, being then a resident of Piedmont in the said State of California, died in said Piedmont intestate, seized and possessed of real and personal property, tangible and intangible, and that all of said property was situated in the United States of America and within the jurisdiction of this court.

V.

That thereafter, the defendants, George G. Mackinnon and William H. Mackinnon, Jr., were duly appointed administrators of the estate of the decedent, William H. Mackinnon, in the Superior Court for the County of Alameda in said State of California, and being so appointed duly qualified as such administrators and acted as such until their discharge on September 8, 1923.

VI.

That pursuant to the provisions of an Act of Congress entitled "An Act to provide revenue, and for other purposes," approved February 24, 1919 (40 Stat. 1057) and hereinafter referred to as the Revenue Act of 1918 and to the regulations duly promulgated by the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, the defendants, George G. Mackinnon and William

H. Mackinnon, Jr., as administrators of the estate of the decedent, William H. [2] Mackinnon, on or about the 15th day of February, 1922, filed with the Collector of Internal Revenue for the First District of California a return for estate tax purposes which purported to set forth:

(a) The value of the decedent's gross estate situated in the United States.

(b) The deductions allowed under Section 403 of the Revenue Act of 1918.

(c) The value of the net estate of the decedent as defined in section 403 of the Revenue Act of 1918, and

(d) The tax paid or payable thereon.

That of the amount of the estate tax due as disclosed by the said return, $10,245.17, $2,183.89 was duly paid on the second day of March, 1922, and the balance, $8,061.28, was duly paid on the fourth day of March, 1922, by the defendants George G. Mackinnon and William H. Mackinnon Jr., as administrators, to the Collecter of Internal Revenue for the First District of California.

VII.

That the aforesaid return was incorrect, misleading and false in the following particulars, to-wit:

(a) In the said return the said administrators set forth that the decedent's gross estate within the United States was $441,706.72, whereas in truth and in fact the gross estate was $514,632.02.

(b) In the said return real estate was valued at

$27,250, whereas in truth and in fact the value of said real estate was $30,330.

(c) In the said return stocks and bonds were valued at $30,018, whereas in truth and in fact the value of said stocks and bonds was $30,002.45.

(d) In the said return mortgages, notes, cash and insurance were valued at $49,365.66, whereas in truth and in fact the value of said mortgages, notes, cash and insurance [3] was $56,676.06.

(e) In the said return other miscellaneous property was valued at $5,696.80, whereas in truth and in fact the value of said other miscellaneous property was $9,654.58.

(f) In the said return the said administrators reported as a deduction on account of administrator's fee $1,988.70, whereas in truth and in fact the deduction allowable on account of administrator's fee was $2,988.70.

(g) In the said return the said administrator reported as a deduction on account of attorney's fee $1,988.70, whereas in truth and in fact the deduction allowable on account of attorney's fee is $2,788.70.

(h) In the said return the said administrators reported as a deduction on account of miscellaneous administration expenses $1338.27, whereas in truth and in fact the deduction allowable on account of miscellaneous administration expenses is $1804.93.

(i) In the said return the said administrators reported as a deduction on account of debts of the decedent $9679.92, whereas in truth and in fact the deduction allowable on account of debts of the decedent is $10,054.82.

(j) In the said return the said administrators re-

ported as a deduction on account of tax liens $5433.15, whereas in truth and in fact no deduction is allowable on account of said tax liens.

(k) In the said return the said administrators reported as a deduction on account of support of dependents $400, whereas in truth and in fact no deduction is allowable on account of support of dependents.

VIII.

That subsequent to the filing of said return the Commissioner of Internal Revenue, upon additional information [4] and facts submitted to him, directed a review and audit to be made of the return of the estate of the decedent and as a result of such review and audit the net estate and tax thereon were found and determined to be as follows:

Gross estate	$514,632.02	
Deductions	68,135.78	
Net estate for tax	$446,496.24	
Estate tax		$13,359.85
Estate tax paid		10,245.17
Additional estate tax due		$ 3,114.68

That the defendants George G. Mackinnon and William H. Mackinnon, Jr., as administrators, duly paid the said additional estate tax due in the amount of $3,114.68 to the Collector of Internal Revenue for the First District of California on April 10, 1923.

IX.

That thereafter the defendants George G. Mackinnon as administrator of the estate of the decedent, William H. Mackinnon, on or about the 31st day of October, 1923, filed with the Collector of Internal Revenue for the First District of California a claim for refund of estate taxes in the amount of $9,899.94 on the ground, among others, that only one-half of the community property of the decedent and his wife should be included in the decedent's gross estate.

X.

That thereafter the Commissioner of Internal Revenue directed a further review and audit to be made of the return of the estate of the decedent and as a result of such review and audit the said Commissioner of Internal Revenue conceded the contention of the defendant, George G. Mackinnon, that only one-half of the community property of the decedent and his wife should be included in the gross estate and as a result of such review and audit the said Commissioner of [5] Internal Revenue redetermined the net estate and taxes thereon as follows:

Gross estate as determined on review		$514,632.02
Decedent's one-half community interest		$257,316.01
Deductions exclusive of specific exemption	$18,135.78	
Additional deductions claimed by the estate	1,750.00	

Total deductions exclusive of the specific exemption	19,885.78	
One-half of the amount thereof to be borne by the decedent's gross estate	9,942.89	
Plus specific exemption	50,000.00	
Total allowable deductions		59,942.89
Net estate		197,373.12
Tax due thereon		3,921.19
Tax paid March 2, 1922	$ 2,183.89	
Tax paid March 4, 1922	8,061.28	
Tax paid April 10, 1923	3,114.68	
Total tax paid	$13,359.85	
Less tax due as herein determined	3,921.19	
Excess payment		$ 9,438.66

That the Commissioner of Internal Revenue thereafter, on October 19, 1925, allowed said claim for refund in the amount of $9,438.66; that interest was allowed in the amount of $1,848.44 from the actual dates of payment to October 19, 1925, the date of allowance of said claim for refund, or a total amount of $11,287.10; that thereafter on the 2nd day of November, 1925, a check for $5,643.55 was mailed to the defendant, Frances Mackinnon Pusey, then Frances Mackinnon, as heir at law of the decedent, William H. Mackinnon, and on the same day a check for $1,410.89 was mailed to the defendant George H.

Mackinnon as heir at law of the decedent, William H. Mackinnon, and on the same day a check for $1,410.89 was mailed to the defendant William H. Mackinnon, Jr., as heir at law of the decedent, and on the same day a check for $1,410.89 was mailed to the defendant Frances Mackinnon Coit [6] as heir at law of the decedent and on the same day a check for $1,410.88 was mailed to the defendant John S. Delancey as guardian for June Mackinnon Delancey, heir at law of the decedent, William H. Mackinnon.

XII.

That thereafter as a result of the decision of the Supreme Court of the United States in the case of *United States* vs. *Robbins,* 269 U. S. 315, it appears that said refunds were erroneous; that there should be included in the gross estate of the decedent the entire value of the community property of the decedent and his wife.

XIII.

The said sums were erroneously refunded in the total amount of $11,217.10 to the defendants by the Commissioner of Internal Revenue and that the estate tax liability is now redetermined by the said Commissioner as follows:

Gross estate	$514,632.02	
Correct amount of tax		$13,289.85
Return tax paid	10,245.17	
Additional tax assessed and paid	3,114.68	

Total assessed	13,359.85	
Tax refunded	9,438.66	
Int. refunded	1,848.44	
Total tax refunded	11,287.10	
Tax discharged		2,072.75
Estate tax liability		$11,217.10

XIV.

That the defendants have been duly notified that the amount of the aforesaid estate tax is due, but that they have wholly neglected and refused and still refuse to pay the said sum or any part thereof; that payment has been duly demanded [7] and that no part of the balance of the aforesaid Federal estate tax in the sum of $11,217.10 has been paid by the defendants or by anyone else; that the tax liability has not been discharged.

XV.

That the plaintiff is informed and believes and, therefore avers that the defendants Frances Mackinnon, George Mackinnon, William H. Mackinnon and Frances Mackinnon Coit and John S. Delancey as guardian for June Mackinnon Delancey, a minor and heir at law of the decedent, William H. Mackinnon, have in their possession real and personal property, a portion of the gross estate of the decedent, William H. Mackinnon, which they took as distributees of said estate, in excess of the tax lia-

bility now due and unpaid and that said property is within the jurisdiction of this court.

XVI.

That there is due and unpaid from the defendants to the plaintiff the sum of $11,217.10, together with interest thereon at the rate of six per cent from January 16, 1922, to the date of payment.

XVII.

That under the provisions of Section 409 of the Revenue Act of 1918, the aforesaid tax and interest thereon became at the time of the decedent's death, and is a lien upon the decedent's gross estate, including the aforesaid property now in the possession of the defendants; that said lien is valid and subsisting, and has not been released as to any or all of the aforesaid property; that said property is now situated and found within the United States and within the jurisdiction of this court.

XVIII.

That notice of said lien was recorded with the Clerk [8] of this Honorable Court and with the Register of Deeds for the County of Alameda in said State of California, and copies of said notice were served upon the defendants before the filing of this complaint.

XIX.

That thereafter due notice of said tax and demand for the payment thereof was made upon the defendants, but that said defendants failed and refused and still refuse to pay said tax or any part thereof.

XX.

That the plaintiff has no adequate remedy at law for the enforcement of its lien and the collection of said estate taxes against the estate of the decedent, William H. Mackinnon, or the defendants herein.

XXI.

That the Commissioner of Internal Revenue authorizes and sanctions these proceedings.

WHEREFORE, the plaintiff being without a clear, adequate and complete remedy at law comes before this court and prays:

1. That this Honorable Court order, adjudge and decree that there is due and owing to the United States from the estate of William H. Mackinnon, additional Federal estate taxes in the sum of $11,217.10.

2. That this Honorable Court order, adjudge and decree that the gross estate of the decedent, William H. Mackinnon, hereinabove set forth and now in the hands of the defendants, is subject to a lien and constitutes a trust fund for the payment of the Federal estate tax due and owing by the said estate to the plaintiff, and that the defendants and each of them be enjoined from disposing of any moneys or other property, real or personal, which formed a portion of the gross estate of the decedent, William H. Mackinnon, which are [9] now in their possession; that the court further order, adjudge and decree that unless the Federal estate tax and interest due the plaintiff, together with the costs of this proceeding, shall on or before a certain day be paid, such portion of the gross estate of the decedent, William H. Mackinnon, as

remains in the hands of the defendants be applied to the satisfaction of the aforesaid estate taxes, interest and costs.

3. That a restraining order or injunction be issued pending the final hearing and decree of this court, whereby the defendants, and each of them be restrained and enjoined from transferring or otherwise disposing of any portion of the gross estate of the decedent, William H. Mackinnon, now in their possession.

4. That the plaintiff may have such other and further relief as the case may require and equity may entitle it to.

5. And the plaintiff prays that due process of subpoena issue out of and under the seal of this Honorable Court directed to the above-named defendants and commanding them on a day certain and under certain penalties therein expressed personally to appear before this court then and there to answer all and singularly and to stand to and perform and abide such orders, directions and decrees as may be made against them in the premises.

GEO. J. HATFIELD,
United States Attorney.

Northern District of California, Southern Division.
Attorney for Plaintiff.

[Endorsed]: Filed January 14, 1927.

WALTER B. MALING,
Clerk.

By Harry L. Fouts,
Deputy Clerk. [10]

[Title of Court and Cause.]

NOTICE OF MOTION TO QUASH.

To Plaintiff, UNITED STATES OF AMERICA and its attorney, GEORGE J. HATFIELD.

YOU AND EACH OF YOU WILL PLEASE TAKE NOTICE that on Monday, the 21st day of February, 1927, at the hour of ten o'clock A. M., or as soon thereafter as counsel can be heard, in the Court Room of the above entitled Court, before the Honorable Judge sitting in Equity, the defendants herein, and each of them, specially appearing by and through their solicitor, Carey Van Fleet, will move to quash service of the subpoena ad respondendum as more fully appears in the annexed motion.

CAREY VAN FLEET,
Solicitor for defendants
specially appearing.

[Title of Court and Cause.]

MOTION TO QUASH.

Now come the defendants in the above entitled action, and each of them, specially appearing by and through their solicitor, Carey Van Fleet, and move to quash the purported service upon them, of that certain subpoena issued in the above entitled cause on the 14th day of January, 1927, upon the ground for the reason that no service was made under Equity

Rule 13 upon said defendants, or either of them, and that no bona fide attempt was made to serve said defendants, or either of them, under Equity Rule 13 or any other rule or process of this court and said defendants deny, and each of them denies, that any legal service was made upon them, [11] or either of them, nor have said defendants, or either of them, accepted service herein, nor have said defendants or either of them voluntarily appeared, and have said defendants, or either of them, waived due service upon them or either of them.

Said defendants state that their appearance herein, and the appearance of each of them, is special, and that if the purpose for which said appearance is made be not sustained by the court, they will appear generally in the cause within the time allowed therefor by law, or order of the court, or stipulation of the opposite party. Said motion will be made upon all the papers and records in the above entitled proceeding, the return of the Marshall and the affidavits of William H. Mackinnon, Jr., and John S. Delancey.

CAREY VAN FLEET,
Solicitor for defendants
specially appearing.

Service and receipt of a copy of the within Notice and Motion to Quash is hereby admitted this 16th day of February, 1927.

GEO. J. HATFIELD,
K.
Attorney for Plaintiff.

[Endorsed]: February 16, 1927.

WALTER B. MALING,
Clerk.
By Harry F. Fouts,
Deputy Clerk. [12]

[Title of Court and Cause.]

(AFFIDAVIT OF JOHN S. DELANCY)

State of California,
County of Alameda,—ss.

JOHN S. DE LANCEY, being first duly sworn, deposes and says: That he is the guardian of JUNE MACKINNON DE LANCEY, a minor and one of the defendants named in the above entitled matter; that service of the subpoena ad Respondendum of Date the 14th day of January, 1927, and of our independence the 151st in the above entitled matter, was made by delivering the same at the office of affiant during affiant's absence and at no time was said subpoena served personally upon affiant, although your affiant was at his office a considerable portion of the day when said subpoena was left as aforesaid and was at his home and in his office at various times during said day and every day thereafter.

JOHN S. DELANCEY.

Subscribed and sworn to before me this 16th day of February, 1927.

(Seal) R. H. CONDIE,

Notary Public in and for the County of Alameda, State of California.

Service and receipt of a copy of the within Affidavit is hereby admitted this 16th day of February, 1927.

GEO. H. HATFIELD,
K.
Attorney for Plaintiff.

[Endorsed]: Filed Feb. 16, 1927.

WALTER B. MALING,
Clerk. [13]

[Title of Court and Cause.]

AFFIDAVIT OF WILLIAM H. MACKINNON, JR., FOR USE ON MOTION TO QUASH AND MOTION TO DISMISS

State of California,
City and County of
San Francisco—ss.

WILLIAM H. MACKINNON, JR., being duly sworn, deposes and says:

That he is mentioned as one of the defendants in the above entitled action. That he is William H. Mackinnon, Jr., mentioned in the complaint in the above entitled action, who is the Administrator of the Estate of William H. Mackinnon, deceased.

That he lives at 236 Lakeshore Boulevard, in the City of Oakland, County of Alameda, State of California. That on the 15th day of January, 1927, he was at home at his said residence at about ten o'clock

in the morning of said day. That at said time a man called up his residence and the said affiant talked to the said man over the telephone and the said man said he was calling up from the office of said affiant at 2218 San Pablo Avenue, City of Oakland, County of Alameda, State of California. That he understood said man to say that he was from Marsh & McLennan, Insurance Brokers, with whom said affiant had pending business and said man told him that he had some papers for him, said affiant. Said affiant asked him what the papers consisted of. Said man evaded the question and did not tell him what the papers were. Said man asked him when he was coming to the office. Said affiant told him that he did not know when he would be at his office and if he had any papers to leave them at his office. Said affiant did not get to his office until the following Monday, January 17th, 1927. There he found four (4) subpoenas on his [14] desk, purporting to have been issued on the 14th day of January, 1927, entitled in the above entitled cause, copy of which is hereunto annexed and marked Exhibit "A". That said affiant was not expecting said subpoenas, knew nothing of the filing of the above entitled action and the first intimation of the filing of the above entitled action came to him when he found the four (4) subpoenas on his desk. Affiant did not know that any United States Marshall or other officer was seeking him and does not now know any more about the circumstances of the case than as already related here, and as related to him by one G. F. Hatches, who was in the office when some man came in on the 15th day of January, 1927, at the hour

of ten o'clock A. M. or thereabouts and asked said Hatches where he could communicate with said affiant. Upon communicating by telephone, as aforesaid, with said affiant, he left said papers on affiant's desk. The said G. F. Hatches is not a partner of said affiant, not associated with him in any way, but said G. P. Hatches has a key to affiant's office for his convenience at times.

Affiant further states that his mother, Mrs. Frances Mackinnon Pusey, mentioned as one of the defendants in this case, lives at Magnolia and Nova Drive in Piedmont, County of Alameda, State of California, where she has a large and well-known place.

That his said mother, Frances Mackinnon Pusey, was at home on the 15th day of January, 1927, and available and has not left her home since said date. That Frances Mackinnon Coit, affiant's sister, mentioned as one of the defendants in the above entitled action, lives at 82 Fairview Avenue, Piedmont, County of Alameda, State of California, and, as your affiant knows, was at home on the 15th day of January, 1927, [15] and has been at home ever since said date. That George G. Mackinnon, affiant's brother, mentioned as one of the defendants in the above entitled action, lives at 176 Perkins Street, City of Oakland, County of Alameda, State of California, and was at home with his wife, as your affiant knows, on said 15th day of January, 1927. That said George G. Mackinnon has been home ever since that time by reason that his wife has been sick for the last four (4) weeks. When your affiant says that each of the above parties was at home, he means that they were each in and about

their respective homes and available thereto on the dates mentioned.

Further, affiant sayeth not.

WILLIAM H. MACKINNON, JR.

Subscribed and sworn to before me this 15th day of February, 1927.

(Seal) JEFFERSON E. PEIPER,
Notary Public in and for the City and County of San Francisco, State of California. [16]

"EXHIBIT A"

UNITED STATES OF AMERICA

In the Southern Division of the United States District Court, Northern District of California, Third Division.

IN EQUITY

THE PRESIDENT OF THE UNITED STATES OF AMERICA, GREETING: To FRANCES MACKINNON PUSEY, GEORGE G. MACKINNON, WILLIAM H. MACKINNON, JR., FRANCES MACKINNON COIT and JOHN S. DELANCEY, Guardian of JUNE MACKINNON DELANCY, a Minor.

YOU ARE HEREBY COMMANDED, That you be and appear in the Southern Division of the United States District Court for the Northern District of California, Third Division, aforesaid, at the Court

Room in the City of San Francisco, twenty days from the date hereof, to answer a Bill of Complaint exhibited against you in said Court by UNITED STATES OF AMERICA, Who citizen of the ———— and to do and receive what the said Court shall have considered in that behalf.

WITNESS, the HONORABLE FRANK H. KERRIGAN, Judge of said District Court, this 14th day of January, in the year of our Lord one thousand nine hundred and twenty-seven and of our Independence the 151st.

(Seal) WALTER B. MALING,
Clerk.

By A. C. Aurich,
Deputy Clerk. [17]

MEMORANDUM PURSUANT TO RULE 12, RULES OF PRACTICE FOR THE COURTS OF EQUITY OF THE UNITED STATES.

YOU ARE HEREBY REQUIRED to file your answer or other defense in the above suit, on or before the twentieth day after service, excluding the day thereof, of this subpoena, at the Clerk's Office of said Court, pursuant to said Bill: otherwise the said Bill may be taken pro confesso.

WALTER B. MALING,
Clerk.

By A. C. Aurich,
Deputy Clerk.

Service and receipt of a copy of the within Affi-

davit is hereby admitted this 16th day of February, 1927.

GEORGE J. HATFIELD,
K.
Attorney for Plaintiff.

[Endorsed]: Filed February 16, 1927.

WALTER B. MALING,
Clerk. [18]

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Monday, the 21st day of February, in the year of our Lord one thousand nine hundred and twenty-seven.

PRESENT: the Honorable Frank H. Kerrigan.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

FRANCIS MACKINNON PUSEY, et al.,
Defendants.

After argument it is ordered that the motion to quash service on the calendar this day in the above entitled case, be and the same is hereby granted. [19]

[Title of Court and Cause.]

NOTICE OF MOTION TO DISMISS

To Plaintiff, UNITED STATES OF AMERICA, and its attorney, GEORGE J. HATFIELD.

YOU AND EACH OF YOU WILL PLEASE TAKE NOTICE that on Monday, the 7th day of March, 1927, at the hour of ten o'clock A. M., or as soon thereafter as counsel can be heard at the courtroom of the above entitled court before the Honorable Judge sitting in Equity, defendants herein and each of them, by and through their solicitor, Carey Van Fleet, will move to dismiss the complaint or bill in equity as more fully appears in the annexed motion.

CAREY VAN FLEET,
Solicitor for Defendants.

Service and receipt of a copy of the within Motion to Dismiss is hereby admitted this 1st day of March, 1927.

GEORGE J. HATFIELD,
Attorney for Plaintiff.

[Endorsed]: Filed March 2, 1927.

WALTER B. MALING,
Clerk. [20]

[Title of Court and Cause.]

MOTION TO DISMISS.

Now come the defendants in the above entitled action and each of them appearing by and through their solicitor, Carey Van Fleet, and move to dismiss the bill in equity in the above entitled action upon the grounds and for the reasons:

I.

That it appears on the face of the bill and the record in this case that all proceedings for the collection of the tax set forth in said bill were barred by Section 1320 of the Revenue Act of 1921, as the government did not begin this proceeding within five (5) years after the date when said tax was due and within six (6) years after the death of the decedent.

II.

That the statute was not tolled by the issuance of process in the above entitled action on the 26th day of January, 1927, and the service thereof on the 28th day of January, 1927. In this behalf, the date of commencement of the above entitled action was postponed to the date of this service of process, which was after the statute of limitations had run.

III.

That in order to toll the statute there must be a delivery of the writ followed either by a service of the same or a bonafide effort to serve it.

IV.

The above entitled action is barred by Section 310 of the Revenue Act of 1926, which cuts down the period of the statute of limitations to three (3) years after the [21] return is filed.

Said motion will be made upon the papers and records in the above entitled proceeding and upon the affidavits of William H. Mackinnon, Jr., and John S. Delancey used in the motion to quash.

CAREY VAN FLEET,
Solicitor for Defendants.

Service and receipt of a copy of the within Motion to Dismiss is hereby admitted this 1st day of March, 1927.

GEO. J. HATFIELD,
Attorney for Plaintiff.

[Endorsed]: Filed March 2, 1927.
WALTER B. MALING,
Clerk. [22]

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Tuesday, the 12th day of April, in the year of our Lord one thousand nine hundred and twenty-seven.

PRESENT: the Honorable A. F. ST. SURE, District Judge.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

FRANCES MACKINNON PUSEY, et al.,

Defendants.

Defendant's motion to dismiss heretofore argued and submitted, being now fully considered, it is ordered that said motion be and the same is hereby denied. [23]

District Court of the United States, Northern District of California, Third Division. In Equity.

THE PRESIDENT OF THE UNITED STATES OF AMERICA

To FRANCES MACKINNON PUSEY, GEORGE G. MACKINNON, WILLIAM H. MACKINNON, JR., FRANCES MACKINNON COIT, and JOHN S. DELANCEY, Guardian of JUNE MACKINNON DELANCEY, a Minor, Greeting:

YOU ARE HEREBY COMMANDED, That you be and appear in the Southern Division of the United States District Court for the Northern District of California, Third Division, aforesaid, at the Court Room in the City of San Francisco, twenty days from the date hereof, to answer a Bill of Complaint exhibited against you in said Court by UNITED STATES OF AMERICA, and to do

and receive what the said Court shall have considered in that behalf.

WITNESS, the Honorable FRANK H. KERRIGAN, Judge of Said District Court, this 14th day of January, in the year of our Lord one thousand nine hundred and twenty-six and of our Independence the 151st.

[Seal]

WALTER B. MALING,
Clerk.

By A. C. Aurich (Sgd),
Deputy Clerk.

Memorandum Pursuant to Rule 12, Rules of Practice for the Courts of Equity of the United States:

YOU ARE HEREBY REQUIRED to file your answer or other defense in the above suit on or before the twentieth day after service, excluding the day thereof, of this subpoena, at the Clerk's Office of said Court, pursuant to said Bill; otherwise the said Bill may be taken *pro confesso.*

WALTER B. MALING,
Clerk.

By A. C. Aurich (Sgd),
Deputy Clerk.

RETURN ON SERVICE WRIT.

United States of America,
Northern District of California—ss.

I hereby certify and return that I served the an-

nexed Subpoena and Equity on the therein-named John S. DeLancey, Guardian of June Mackinnon De Lancey, a Minor, by handing to and leaving a true and correct copy thereof with Miss Mary Eissle, Steno for John S. Delancey personally at Oakland, Calif., in said District on the 15th day of Jan., A. D. 1927.

FRED ESOLA,
U. S. Marshal.

By E. H. Gibson,
Deputy.

RETURN ON SERVICE OF WRIT.

United States of America,
Northern District of California—ss.

I hereby certify and return that I served the annexed Subpoena and Equity on the therein-named FRANCIS MACKINNON PUSEY, GEORGE G. MACKINNON, WILLIAM H. MACKINNON JR., FRANCES MACKINNON COIT by handing to and leaving a true and correct copy thereof with G. F. HATCHES, Partner of Wm. H. Mackinnon Jr., personally at Oakland, Calif., in said District on the 15th day of Jan., A. D. 1927.

FRED ESOLA,
U. S. Marshal.

By E. H. Gibson,
Deputy.

[Endorsed]: Filed Jan. 15, 1927.

WALTER B. MALING,
Clerk.
By Harry L. Fouts,
Deputy Clerk. [24]

District Court of the United States, Northern District of California, Third Division. In Equity.

THE PRESIDENT OF THE UNITED STATES OF AMERICA

To FRANCES MACKINNON PUSEY, GEORGE G. MACKINNON, WILLIAM H. MACKINNON, JR., FRANCES MACKINNON COIT, and JOHN S. DELANCY, Guardian of JUNE MACKINNON DELANCEY, a, Minor, Greeting:

YOU ARE HEREBY AS YOU HAVE HERETOFORE BEEN COMMANDED, That you be and appear in the Southern Division of the United States District Court for the Northern District of California, Third Division, aforesaid, at the Court Room in the City of San Francisco, twenty days from the date hereof, to answer a Bill of Complaint exhibited against you in said Court by UNITED STATES OF AMERICA and to do and receive what the said Court shall have considered in that behalf.

WITNESS, the Honorable FRANK H. KERRIGAN, Judge of said District Court, this 26th day of January in the year of our Lord one thousand nine

hundred and twenty-seven and of our Independence the 151st.

(Seal) WALTER B. MALING,
Clerk.

By A. C. Aurich,
Deputy Clerk.

Memorandum Pursuant to Rule 12, Rules of Practice for the Courts of Equity of the United States

YOU ARE HEREBY REQUIRED to file your answer or other defense in the above suit on or before the twentieth day after service, excluding the day thereof, of this subpoena, at the Clerk's Office of said Court, pursuant to said Bill; otherwise the said Bill may be taken *pro confesso.*

WALTER B. MALING,
Clerk.

By A. C. Aurich,
Deputy Clerk.

RETURN ON SERVICE WRIT.

United States of America,
Northern District of California—ss.

I hereby certify and return that I served the annexed Subpoena ad Respondendum on the therein-named JOHN S. DELANCEY GUARDIAN OF JUNE MACKINNON DELANCEY (A Minor) by handing to and leaving a true and correct copy thereof with said John S. Delancey as the Guardian of June

Mackinnon Delancey a minor personally at Oakland in said District on the 28th day of January, A. D. 1927.

FRED L. ESOLA,
U. S. Marshal.

By Geo. H. Burnham,
Deputy.

RETURN ON SERVICE WRIT.

United States of America,
Northern District of California—ss.

I hereby certify and return that I served the annexed Subpoena ad Respondendum on the therein-named FRANCES MACKINNON PUSEY; WILLIAM H. MACKINNON JR., FRANCES MACKINNON COIT by handing to and leaving a true and correct copy thereof with each of said Francis Mackinnon Pussey, William H. Mackinnon Jr., and Frances Mackinnon Coit personally at Oakland in said District on the 28th day of January, A. D. 1927.

FRED L. ESOLA,
U. S. Marshal.

By Geo. H. Burnham,
Deputy.

United States Marshal's Office,
Northern District of California.

I hereby certify and return, that I received the within writ on the 27th day of January, 1927, and personally served the same on the 28th day of Jan-

uary, 1927, on George G. Mackinnon by delivering to and leaving with May Ruth Mackinnon an adult person, who is a member or resident in the family of George G. Mackinnon (towit the wife of said George G. Mackinnon) one of said defendants named therein, at Oakland, County of Alameda, in said District, a copy thereof, at the dwelling house or usual place of abode of said George G. Mackinnon (176 Perkins St.) one of said defendants herein.

FRED L. ESOLA,
U. S. Marshal.

By Geo. H. Burnham,
Deputy.

Dated at San Francisco, Cal. January 28th, 1927.
[Endorsed]: Filed Jan. 28, 1927.

WALTER B. MALING,
Clerk.

By Harry L. Fouts,
Deputy Clerk. [25]

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Wednesday, the 13th day of February, in the year of our Lord one thousand nine hundred and twenty-nine.

PRESENT: the Honorable FRANK H. KERRIGAN, District Judge.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

FRANCES MACKINNON PUSEY, et al.,

Defendants.

Ordered that the order heretofore submitting the issues herein be and the eame is hereby vacated and set aside, and that this case be and it is hereby transferred to the law side of this Court. [26]

[Title of Court and Cause.]

AMENDED COMPLAINT.

The plaintiff by its attorney, Geo. J. Hatfield, United States Attorney for the Northern District of California, for its cause of action alleges and says:

I.

That at all times hereinafter mentioned, the plaintiff was and now is a corporation sovereign and body politic.

II.

That the defendant Frances Mackinnon Pusey is a citizen of the United States and an inhabitant of the State of California, residing at Piedmont in said State, and within the jurisdiction of this court; that the defendant George G. Mackinnon is a citizen of the United States and an inhabitant of the State of

California residing at Oakland in said State and within the jurisdiction of this [27] court; that the defendants William H. Mackinnon, Jr., and Frances Mackinnon Coit, are citizens of the United States and inhabitants of the State of California, residing at Piedmont in said State and within the jurisdiction of this court; that the defendant John S. Delancey, guardian of June Mackinnon Delancey, a minor and heir at law of the decedent, William H. Mackinnon, is a citizen of the United States and an inhabitant of the State of California residing at Oakland in said State and within the jurisdiction of this court.

III.

That on or about the 16th day of January, 1921, William H. Mackinnon, being then a resident of Piedmont, in the said State of California, died in said Piedmont intestate, seized and possessed of real and personal property, tangible and intangible, and that all of said property was situated in the United States of America and within the jurisdiction of this court.

IV.

That thereafter, the defendants George G. Mackinnon and William H. Mackinnon, Jr., were duly appointed administrators of the estate of the decedent, William H. Mackinnon in the Superior Court for the County of Alameda in said State of California, and being so appointed duly qualified as such administrators and acted as such until their discharge on September 8, 1923.

V.

That pursuant to the provisions of an Act of Congress entitled "An Act to provide Revenue, and for other purposes," approved February 24, 1919, (40 Stat. 1057) and hereinafter referred to as the Revenue Act of 1918, and to [28] the regulations duly promulgated by the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, the defendants George G. Mackinnon and William H. Mackinnon, Jr., as administrators of the estate of the decedent, William H. Mackinnon, on or about the 15th day of February, 1922, filed with the Collector of Internal Revenue for the first district of California, a return for estate tax purposes which purported to set forth:

(a) The value of the decedent's gross estate situated in the United States;

(b) The deductions allowed under Section 403 of the Revenue Act of 1918;

(c) The value of the net estate of the decedent as defined in Section 403 of the Revenue Act of 1918, and

(d) The tax paid or payable thereon.

That of the amount of the estate tax due as disclosed by the said return, $10,245.17, $2,183.89 was duly paid on the second day of March, 1922, and the balance $8,061.28, was duly paid on the fourth day of March, 1922, by the defendants George G. Mackinnon and William H. Mackinnon, Jr., as administrators, to the Collector of Internal Revenue for the First District of California.

VI.

That the aforesaid return was incorrect, misleading and false in the following particulars, to-wit:

(a) In the said return the said administrators set forth that the decedent's gross estate within the United States was $441,706.72, whereas in truth and in fact the gross estate was $514,632.02.

(b) In the said return real estate was valued at $27,250.00, whereas in truth and in fact the value of said real estate was $30,330.00. [29]

(c) In the said return stocks and bonds were valued at $30,018.00 whereas in truth and in fact the value of said stocks and bonds was $30,002.45.

(d) In the said return mortgages, notes, cash and insurance were valued at $49,365.66, whereas in truth and in fact the value of said mortgages, notes, cash and insurance was $56,676.06.

(e) In the said return other miscellaneous property was valued at $5696.80, whereas in truth and in fact the value of said other miscellaneous property was $9654.58.

(f) In the said return the said administrators reported as a deduction on account of administrator's fee $1988.70, whereas in truth and in fact the deduction allowable on account of administrator's fee was $2988.70.

(g) In the said return the said administrator reported as a deduction on account of attorney's fee $1988.70, whereas in truth and in fact the deduction allowable on account of attorney's fee is $2788.70.

(h) In the said return the said administrator reported as a deduction on account of miscellaneous

administration expenses $1338.27, whereas in truth and in fact the deduction allowable on account of miscellaneous administration expenses is $1804.93.

(i) In the said return the said administrators reported as a deduction on account of debts of the decedent $9679.92, whereas in truth and in fact the deduction allowable on account of debts of the decedent is $10,054.82.

(j) In the said return the said administrators reported as a deduction on account of tax liens $5433.15, whereas in truth and in fact no deduction is allowable on account of said tax liens.

(k) In the said return the said administrators reported as a deduction on account of support of dependents $400, whereas in truth and in fact no deduction is allowable on account of support of dependents.

VII.

That subsequent to the filing of said return the Commissioner of Internal Revenue, upon additional information and facts submitted to him, directed a review and audit to be made of the return of the estate of the de- [30] cedent and as a result of such review and audit the net estate and tax thereon were found and determined to be as follows:

Gross estate	$514,632.02	
Deductions	68.135.78	
Net estate for Tax	$446,496.24	
Estate tax		$13,359.85
Estate tax paid		10,245.17
Additional estate tax due		$ 3,114.68

That the defendants George G. Mackinnon and William H. Mackinnon, Jr., as administrators, duly paid the said additional estate tax due in the amount of $3114.68 to the Collector of Internal Revenue for the First District of California on April 10, 1923.

VIII.

That thereafter the defendant George G. Mackinnon as administrator of the estate of the decedent, William H. Mackinnon, on or about the 31st day of October, 1923, filed with the Collector of Internal Revenue for the First District of California a claim for refund of estate taxes in the amount of $9899.94 on the ground, among others, that only one-half of the community property of the decedent and his wife should be included in the decedent's gross estate.

IX.

That thereafter the Commissioner of Internal Revenue directed a further review and audit to be made of the return of the estate of the decedent and as a result of such review and audit the said Commissioner of Internal Revenue conceded the contention of the defendant, George G. Mackinnon, that only one-half of the community property of the decedent and his wife should be included in the gross [31] estate and as a result of such review and audit the said Commissioner of Internal Revenue redetermined the net estate and taxes thereon as follows:

Gross estate as determined
on review $514,632.02

Decedent's one-half community interest		$257,316.01
Deductions exclusive of specific exemption	18,135.78	
Additional deductions claimed by the estate	1,750.00	
Total deductions exclusive of specific exemption	19,985.78	
One-half of the amount thereof to be borne by the decedent's gross estate	9,942.89	
Plus specific exemption	50,000.00	
Total allowable deductions		59,942.89
Net estate		$197,373.12
Tax due thereon		3,921.19
Tax paid March 2, 1922	$ 2,183.89	
Tax paid March 4, 1922	8,061.28	
Tax paid April 10, 1923	3,114.68	
	$13,359.85	
Less tax due as herein determined	3,921.19	
Excess payment		9,438.66

X.

That the Commissioner of Internal Revenue thereafter, on October 19, 1925, allowed said claim for refund in the amount of $9,438.66; that interest was allowed in the amount of $1,848.44 from the actual

dates of payment to October 19, 1925, the date of allowance of said claim for refund, or a total amount of $11,287.10; that thereafter on the 2nd day of November, 1925, a check for $5,643.55 was mailed to the defendant Frances Mackinnon Pusey, then Frances Mackinnon, as heir at law of the decedent, William H. Mackinnon, and on the same day a check for $1,410.89 was [32] mailed to the defendant George H. Mackinnon as heir at law of the decedent, William H. Mackinnon and on the same day a check for $1,410.89 was mailed to the defendant William H. Mackinnon, Jr., as heir at law of the decedent, and on the same day a check for $1,410.89 was mailed to the defendant Frances Mackinnon Coit as heir at law of the decedent, and on the same day a check for $1,410.89 was mailed to the defendant John S. Delancey as guardian for June Mackinnon Delancey, heir at law of the decedent, William H. Mackinnon.

XI.

That thereafter as a result of the decision of the Supreme Court of the United States in the case of *United States* vs. *Robbins,* 269 U. S. 315, it appears that said refunds were erroneous; that there should be included in the gross estate of the decedent the entire value of the community property of the decedent and his wife.

XII.

That there is due and unpaid from the defendants to the plaintiff the sum of $11,217.10, together with interest thereon at the rate of seven per cent from

January 16, 1922, to the date of payment; that no part of said sum has ever been paid by defendants to plaintiff although demand therefor has often been made.

XIII.

That heretofore, to-wit, on or about the 2nd day of November, 1925, the defendants became indebted to plaintiff in the sum of $11,287.10 for money had and received to the use of plaintiff. That no part of said sum has ever been paid by defendants, or either, or any of them, to plaintiff although demand therefor has often been made.

WHEREFORE, plaintiff prays that it have judgment [33] against defendants for the sum of $11,-287.10, together with interest thereon at the rate of seven per cent per annum from the 2nd day of November, 1925, and for costs of suit.

GEO. J. HATFIELD,
United States Attorney,
Attorney for Plaintiff.

Service of the within Amended Complaint by copy admitted this 22nd day of August, 1929.

CAREY VAN FLEET,
Per F. Hall,
Attorney for Certain Defendants.

[Endorsed]: Filed, August 22, 1929.

WALTER B. MALING,
Clerk.
By Harry L. Fouts,
Deputy Clerk. [34]

[Title of Court and Cause.]

AMENDED ANSWER.

Now come the defendants by their attorney, Carey Van Fleet, and not waiving any of the defenses heretofore interposed in their answer to plaintiff's original complaint, and not waiving any of their objections to the order of the Court transferring this cause from the equity side to the law side of the Court, and not waiving any of their objections to the jurisdiction of the Court to try this cause on the law side and admit, allege and deny as follows:

I.

Admit the allegations contained in Paragraphs I. II, III, IV and V of said amended complaint.

II.

Deny that the return referred to in Paragraph VI of said amended complaint was incorrent or misleading or false in any of the particulars set forth in Paragraph VI of said amended complaint, or in any particulars, or at all, and in this behalf allege; that said return was made entirely in good faith and the particulars pointed out in said Paragraph VI of said amended complaint were changes made by the Commissioner of Internal Revenue in the ordinary routine of his office.

III.

Admit the allegations contained in Paragraphs VII, VIII, IX and X of said amended complaint.

IV.

Denying the allegations of said Amended Complaint contained in Paragraph XI, defendants deny that thereafter as a result of the decision of the Supreme Court of the United [35] States in the case of U. S. vs. Robbins, 269 U. S. 315, it appears that said refunds were erroneous; deny that said refunds were erroneous; deny that there should be included in the gross estate of the decedent the entire value of the community property of the decedent and his wife.

Deny that said refunds were made by the Commissioner of Internal Revenue through any mistake of law or fact. Deny that it has ever been finally determined by the Supreme Court of the United States that said refunds were erroneous in law or fact. And in this behalf allege that under date of July 12th, 1926, the Secretary of the Treasury approved an opinion of the Attorney-General, recommending that a test case should be carried to the Supreme Court of the United States to determine the question as to whether these refunds were erroneous; allege that no such test case was ever finally determined by the Supreme Court of the United States; deny that any money is being wrongfully withheld by these defendants from the United States.

VI.

Deny that there is due or unpaid from the Defendants to the plaintiff the sum of $11,217.10, or any sum at all, or any interest upon any sum at all; deny that no part of said sum *as* ever been paid by de-

fendants to plaintiff, or that any such sum or any sum at all is owing by defendants to plaintiff.

VII.

Deny that heretofore on or about the 2nd day of November, 1925, or on any other day, or at all, the defendants became indebted to plaintiff in the sum of $11,287.10, or in any sum, or at all, for money had or received, or for any money at all to the use of plaintiff. Deny that any part of [36] said sum, or said sum, or any sum at all, is owing by defendants to plaintiff.

AND FOR FURTHER AND SEPARATE DEFENSES AND COUNTERCLAIM DEFENDANTS ALLEGE AS FOLLOWS:

I.

That the estate tax set forth in the complaint herein and which was refunded by the Treasury Department to the defendants as set forth therein was not levied upon any portion of the estate of William H. MacKinnon, deceased, passing to the distributees of said estate, but in truth and in fact was levied upon an alleged transfer of real property of the said William H. MacKinnon, deceased, to the wife of said William H. MacKinnon, deceased, now Frances Mackinnon Pusey, before the death of William H. MacKinnon, deceased, on the 13th day of December, 1920. Said transfer consisted of deeds of gift by said William H. MacKinnon, deceased, to his said wife for a valuable consideration, of real property, situate in the County of Alameda, County of Fresno, and County

of Los Angeles, State of California, executed on the 13th day of December, 1920. The value of said real property was appraised at the sum of Three Hundred Sixty Eight Thousand Three Hundred Seventy Six Dollars ($368,376.00) more or less at the time of levying said estate tax. Said deeds of gift were made in good faith and not in contemplation of death and were intended to take effect in possession and enjoyment immediately during the lifetime of the decedent.

Defendants allege that the estate tax paid upon said transfer was made through mistake of law by these defendants; that they were misguided as to their rights in making said payment of said estate tax and that the amount erroneously [37] paid by them more than off sets the claim of the government herein.

II.

That the amended complaint herein sets forth an entirely new, separate and distinct cause of action from that set forth in the original complaint herein and said new cause of action is barred by subdivision b of section 610 of the Revenue Act of 1928.

III.

That there was never any redetermination by the Commissioner of Internal Revenue after the determination set forth in Paragraphs IX and X of said amended complaint, and there was never any assessment by the Commissioner of Internal Revenue against these defendants within the time allowed by Section 1322 of the Act of 1921. That the determination of the Commissioner in allowing the claim

for refund as set forth in the amended complaint was final and conclusive.

IV.

That on or about the 24th day of February, 1923, after the defendant Frances MacKinnon Pusey had paid all the estate taxes, demanded by the United States Government, she conveyed her property to the other defendants herein by deeds outright and by a deed of trust; that said deed of trust consisted wholly of real property and was for the benefit of herself during life and upon her death to continue for the benefit of the other defendants herein; that said property contained in said deed of trust is subject to a mortgage in the sum of $67,000.00, and the income derived therefrom is not sufficient to pay the tax demanded by the Government of the United States in this action and she will be further required to mortgage the property in said deed of trust, which would require a dissolution of this deed of [38] trust and endless expensive litigation.

That she has been lulled into security by the action of the Government during these years, particularly by the refunding of the amount set forth in the amended complaint and if she is required to raise the amount now demanded by the Government she will suffer great injury to her property.

It is alleged that by reason of these facts the Government is estopped from collecting the sum of money demanded in the amended complaint and said claim is without equity or good conscience.

WHEREFORE defendants pray that plaintiff take

nothing by this action and that they be dismissed hence with their costs.

CAREY VAN FLEET,
Attorney for Defendants.

State of California,
City and County of San Francisco—ss.

Carey Van Fleet being duly sworn deposes and says: That he is the attorney of the defendants in the above entitled action; that all of said defendants are absent from the County in which he has his office and that he has knowledge of the facts stated in said amended answer; that he has read the foregoing amended answer and knows the contents thereof, and the same are true of his own knowledge except as to those matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

CAREY VAN FLEET.

Subscribed and sworn to before me this 5th day of September, 1929.

[Seal] FLORA HALL,

Notary Public in and for the City and County of San Francisco, State of California.

Due service and receipt of a copy of the within Amended Answer is hereby admitted this 5th day of September, 1929.

GEO. J. HATFIELD,
Attorney for Pltf.

[Endorsed]: Filed, Sept. 6, 1929.

WALTER B. MALING,
Clerk. [39]

[Title of Court and Cause.]

DEMURRER TO AMENDED ANSWER TO AMENDED COMPLAINT.

COMES NOW the plaintiff above named by Geo. J. Hatfield, United States Attorney for the Northern District of California, and demurs to the amended answer of defendants in the above entitled action on the following grounds:

I.

That the counterclaim set out in defendants' amended answer to the amended complaint does not state facts sufficient to constitute a counterclaim against the plaintiff or at all.

II.

That the first separate defense does not state facts sufficient to constitute a counterclaim against the plaintiff or at all. [40]

III.

That the amended answer does not state facts sufficient to constitute a defense to the cause of action set forth in plaintiff's amended complaint.

IV.

That the second separate defense on page four does not state facts sufficient to constitute a defense.

V.

That the third separate defense on page four does not state facts sufficient to constitute a defense.

VI.

That the fourth separate defense on page five does not state facts sufficient to constitute a defense.

WHEREFORE, plaintiff prays that defendants take nothing by their said counterclaim and their second, third and fourth separate defenses, but that said counterclaim and said defenses be dismissed.

GEO J. HATFIELD (Sgd),
United States Attorney.

CHELLIS M. CARPENTER (Sgd),
Assistant United States Attorney,
Attorneys for Plaintiff.

CERTIFICATE THAT THE GROUNDS OF DEMURRER ARE MERITORIOUS.

I, Chellis M. Carpenter, one of the attorneys for the above named plaintiff do hereby certify that the above demurrer to defendants' amended answer and counterclaim is not interposed for the purpose of delay and that in my opinion [41] the issues therein raised are well taken in law.

CHELLIS M. CARPENTER,
Assistant United States Attorney.

POINTS AND AUTHORITIES IN SUPPORT OF DEMURRER TO AMENDED ANSWER TO AMENDED COMPLAINT.

A counterclaim is subject to demurrer on the same grounds as is an original complaint.

> Biss vs. Sneath, 119 Cal. 526;
> Herron, Rickard & Cons. vs. Wilson Lyon & Co., 4 Cal. App. 488.

Section 3226 of the Revised Statutes provides:

> "No suit or proceedings shall be maintained * * * for the return of any internal revenue tax alleged to be erroneously or illegally assessed or collected * * * until a claim for refund or *credit* has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof; * * * "

It is to be noted that there is no allegation anywhere in the complaint, not to mention the counterclaim, to the effect that defendants' counterclaim was presented to the Commissioner of Internal Revenue, and therefore the counterclaim does not state facts sufficient to constitute a counterclaim.

Even prior to the enactment of the foregoing provisions of the Revised Statutes counterclaims unless first presented for payment were not permitted to be set up by the defendant in actions brought by the United States. This was by reason of [42]

Section 951 of the Revised Statutes, 28 U. S. C. 774,

which provides:

"In suits *brought by the United States* against individuals, no claim for a credit shall be admitted, upon trial, except such as appear to have been presented to the accounting officers of the Treasury, for their examination, and to have been by them disallowed, in whole or in part, unless it is proved to the satisfaction of the court that the defendant is, at the time of the trial, in possession of vouchers not before in his power to procure, and that he was prevented from exhibiting a claim for such credit at the Treasury by absence from the United States or by some unavoidable accident."

United States vs. Eckford, 6 Wall., 484;
United States vs. Nipissing Mines Co., 206 Fed. 431, 434.

It is plain to be seen that Congress intended by the foregoing enactments that claims against the United States be first presented to the Treasury Department, or to the Commissioner of Internal Revenue if it is a tax matter, in order that the Treasury Department or the Bureau of Internal Revenue as the case may be, may have the opportunity to either allow the claim or reject it.

Friederichsen vs. Renard, 247 U. S. 207.

The case of

> Adams vs. Jones (C.C.A. Alabama 1926), 11 Fed. (2d) 759, certiorari denied 271 U. S. 685,

holds that a transfer to the law side is not the commencing of a new suit but is merely a continuation of the original suit; and the transfer to the law side of the court may be done though a new suit would be barred by the statute of limitations.

> United States vs. Lora Pratt Kelly, 30 Fed. (2d) 193. [43]

Defendants' third separate defense has to do with objecting to matters set forth in plaintiff's amended complaint which were inserted by the plaintiff merely to show the inducement to the Treasury Department for mistakenly paying said moneys to the defendants, which allegations are at the most mere verbiage. Stripped of this verbiage the action is one strictly in common law count form for moneys had and received to the use of the plaintiff.

> United States vs. Lora Pratt Kelly, 30 Fed. (2d) 193.

Receipt of the within Demurrer by copy admitted this 7th day of September, 1929.

CAREY VAN FLEET,
Attorney for.....

[Endorsed]: Filed Sept. 7, 1929. [44]

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Thursday, the 3rd day of October, in the year of our Lord one thousand nine hundred and twenty-nine.

PRESENT: the Honorable FRANK H. NORCROSS, District Judge.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

FRANCES MACKINNON PUSEY, et al.,

Defendants.

This case came on regularly this day for trial, C. M. Carpenter, Esq., Asst. U. S. Attorney, appearing as attorney for plaintiff, and Carey Van Fleet, Esq., appearing on behalf of the defendant. Plaintiff's demurrer to the Amended Answer to Amended Complaint heretofore submitted being fully considered, it is ordered that said Demurrer be, and it is hereby overruled. * * * [45]

[Title of Court and Cause.]

VERDICT.

We, the jury, find for the defendants in the above entitled action.

ALBERT M. BENDER,

Foreman.

[Endorsed]: Filed Oct. 10, 1929 at 10:05 A. M.

WALTER B. MALING,
Clerk.

By C. W. Calbreath,
Deputy Clerk. [46]

In the Southern Division of the United States District Court for the Northern District of California, Second Division.

No. 18342-K

UNITED STATES OF AMERICA,

Plaintiff,

vs.

FRANCES MACKINNON PUSEY, GEORGE G. MACKINNON, WILLIAM H. MACKINNON, JR., FRANCES MACKINNON COIT, and JOHN S. DELANCEY, Guardian of JUNE MACKINNON DELANCEY, a Minor,

Defendants.

JUDGMENT ON VERDICT.

This cause having come on regularly for trial on the 3rd day of October, 1929, being a day in the July, 1929 Term of said court, before the Court and a jury of twelve men, duly impaneled and sworn to try the issues joined herein; Chellis M. Carpenter, Esquire,

Assistant United States Attorney, appearing as attorney for plaintiff and Carey Van Fleet, Esquire, appearing as attorney for defendant; and the trial having been proceeded with on the 3rd, 4th, 9th and 10th days of October, in said year and term, and oral and documentary evidence on behalf of the respective parties having been introduced and closed and the cause, after arguments by the attorneys and the instructions of the Court, having been submitted to the jury and the jury having subsequently rendered the following verdict, which was ordered recorded, namely: "We, the jury, find for the Defendants in the above entitled action. Albert M. Bender, Foreman," and the Court having ordered that judgment be entered in accordance with said verdict and for costs:

Now, therefore, by virtue of the law and by reason of the premises aforesaid, it is considered by the Court that plaintiff take nothing by this action and that defendants go hereof without day and that said defendants do have and recover of and from said plaintiff their costs herein expended taxed at $52.80.

Judgment entered October 10th, 1929.

WALTER B. MALING,
Clerk. [47]

[Title of Court and Cause.]

STIPULATION AND ORDER EXTENDING TIME AND TERM WITHIN WHICH TO FILE BILL OF EXCEPTIONS.

IT IS HEREBY STIPULATED by and between

the parties to the above entitled action that the plaintiff may have to and including the 29th day of January, 1930, within which to prepare, file and serve its proposed bill of exceptions, and

IT IS FURTHER STIPULATED AND AGREED that for the purpose of preparing, settling, signing and filing the bill of exceptions in the said case the July 1929 term of the above-entitled court within which the judgment therein was entered and which is extended by and under the terms of Rule 8 of the Rules of this Court, be extended to and into and so as to include the November 1929 term of said Court, to the *29th day* of January, 1930, thereof.

Dated: October 14, 1929.

GEO. J. HATFIELD,
By Chellis M. Carpenter,
Asst. United States Attorney, Attorney for Plaintiff.

CAREY VAN FLEET,
Attorney for Defendant.

It is so ordered.

FRANK H. NORCROSS,
United States District Judge.

[Endorsed]: Filed October 14, 1929.

WALTER B. MALING,
Clerk.

[Title of Court and Cause.]

ORDER EXTENDING TIME AND TERM WITHIN WHICH TO FILE BILL OF EXCEPTIONS.

Good cause appearing therefor, IT IS HEREBY ORDERED that the plaintiff above named may have to and including the 20th day of February, 1930, within which to prepare, file and serve its proposed bill of exceptions, and

IT IS FURTHER ORDERED that for the purpose of preparing, settling, signing and filing the bill of exceptions in the said case the July, 1929, term of the above entitled court within which the judgment therein was entered and which is extended by and under the terms of Rule 8 of the Rules of this Court, be extended to and into and so as to include the November, 1929, term of said Court to the 1st day of March, 1930, thereof.

FRANK H. NORCROSS,
United States District Judge.

[Endorsed]: Filed January 27, 1930.

WALTER B. MALING,
Clerk.

[Title of Court and Cause]

STIPULATION FOR SENDING EXHIBITS AND CERTAIN MOVING PAPERS AND ORDERS THEREON TO CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

IT IS HEREBY STIPULATED by and between the parties hereto by their respective counsel that each of the exhibits introduced in evidence in the trial of the above entitled action be sent up to the Circuit Court of Appeals, Ninth Circuit, to be used in the appeal of the above entitled action by the said appellate court in lieu of certified copies thereof, and to be used by said appellate court to the same extent as if incorporated at length in the bill of exceptions herein, and

IT IS FURTHER STIPULATED that the following papers may be sent up to the Circuit Court of Appeals, Ninth Circuit, in lieu of incorporating them in a bill of exceptions:

1. Notice of and motion to set aside order extending time and term (filed February 14th, 1930).
2. Order denying defendants' motion to set aside order extending time and term; [50]
3. Notice of and motion to strike bill of exceptions (filed February 14, 1930);
4. Order denying motion to strike bill of exceptions;
5. Notice of presenting bill of exceptions for settlement (filed February 19, 1930);

6. Notice of protest against settling bill of exceptions (filed February 19, 1930);
7. Order submitting matters settlement bill of exceptions to Judge Norcross;
8. Order vacating minute orders February 13 and 17, 1930;
9. Order denying motion to set aside order extending time to file bill of exceptions and other motions (filed March 3, 1930);
10. Exception to order denying motions and protest.

Dated: March 21, 1930.

GEO. J. HATFIELD,
United States Attorney, Attorney for Plaintiff.

CAREY VAN FLEET,
Attorney for Defendants.

[Endorsed]: Filed, March 21, 1930.

WALTER B. MALING,
Clerk. [51]

[Title of Court and Cause.]

PLAINTIFF'S PROPOSED BILL OF EXCEPTIONS.

To Frances Mackinnon Pusey, George G. Mackinnon, William H. Mackinnon, Jr., Frances Mackinnon Coit, and John S. Delancey, Guardian of June Mackinnon Delancey, a Minor, defendants herein, and to Carey Van Fleet, Esq., their attorney:

You, and each of you, will please take notice that

the attached constitutes plaintiff's proposed bill of exceptions.

GEO. J. HATFIELD,

United States Attorney, Attorney for Plaintiff. [52]

[Title of Court and Cause.]

ENGROSSED BILL OF EXCEPTIONS.

BE IT REMEMBERED that on the 3rd day of October, 1929, the above-entitled cause came on for trial before the Court sitting with a jury, and thereupon the following proceedings took place:

Messrs. Geo. J. Hatfield, United States Attorney for the Northern District of California, and Chellis M. Carpenter, Assistant United States Attorney for said District, appearing for the plaintiff, and Carey Van Fleet, Esq., appearing for the defendants.

THE COURT: Mr. Clerk, you may enter an order that the demurrer to the amended complaint is overruled.

(A jury having been empaneled, the following proceedings were had:)

MR. CARPENTER: I desire to offer in evidence that portion of the March, 1923, assessment list showing an [53] additional assessment of $3114.68 against the estate of William H. Mackinnon of Oakland, California, being a certified copy, certified to by the Secretary of the Treasury under Section 882 of the Revised Statutes. I offer it for the purpose merely of showing that the Commissioner made an assessment at that time.

MR. VAN FLEET: I will object to it, not to the form of it or the authenticity of it, that it is not within the issues of this case. This suit is for money had and received.

THE COURT: The objection will be overruled.

MR. VAN FLEET: An exception.

(Document marked Plaintiff's Exhibit No. 1.)

GEORGE G. MACKINNON, one of the defendants, called as a witness on behalf of the plaintiff, being first duly sworn, testified:

I am the son of William H. Mackinnon, whose estate is involved in this suit. The moneys which were refunded to my mother and the various heirs, the different checks that were received from the government, have not to my knowledge ever been paid back to the government. If it had I certainly would know about it; I know I did not pay back what I am being sued for.

CROSS EXAMINATION.

MR. VAN FLEET: Mr. Mackinnon, what became of the money that you received from the government?

MR. CARPENTER: Objected to as immaterial.

THE COURT: Objection sustained.

MR. VAN FLEET: That will be all, your Honor.

MR. CARPENTER: That is the government's case. We rest. [54]

MR. VAN FLEET: At this time, if your Honor please, I move for a nonsuit upon the ground that there is no evidence to sustain the allegations of the complaint. The complaint is based upon money had

and received. They do not show in what way the money was received or why it should be paid back. They have not shown anything.

My motion for a nonsuit is based upon the following grounds: The insufficiency of the evidence of the government to support the allegations of the complaint, in that it has not been shown that Frances Mackinnon Pusey, or George G. Mackinnon, or William H. Mackinnon, Jr., or Frances Mackinnon Coit, or John S. DeLancey, guardian of June Mackinnon DeLancey, a minor, have money which belongs to the government in equity, in good conscience. The basis of this action is for money had and received. It must be based, under the authorities in California—I think your Honor has a number of them, but I will repeat them here.

THE COURT: Are you referring now to the point raised in the brief as to an action for money had and received, in the nature of an equitable proceeding?

MR. VAN FLEET: Yes. And the government must show that these defendants have money which in equity and good conscience should be repaid to the government.

(Thereupon counsel argued the matter, at the conclusion of which a recess was taken until 2 o'clock p. m.)

THE COURT: Is it stipulated the jury is present?

MR. VAN FLEET: It is so stipulated.

MR. CARPENTER: It will be so stipulated, yes, your Honor.

THE COURT: The motion for non-suit will be denied.

MR. VAN FLEET: Exception, if your Honor please. [55]

MR. VAN FLEET: To complete the record of proof, if your Honor please, I offer in evidence as the basis of the action, since the government did not put it in,—but it will not be necessary for me to read it to the jury,—but this is form 706, but it contains the valuation of the property, which it is necessary for me to refer to later, the real property which was deeded by the husband to his wife, and I offer that in evidence. It is already in evidence on the equity side, and I offer it in this case.

MR. CARPENTER: Objected to on the ground that it does not come within the issues of this case.

MR. VAN FLEET: If your Honor please, it states the valuation of the property, which is the basis of the Government's case, which is Form 706, upon which the estate taxes are based. It is necessary for me to refer to it to show the value, the difference in value as between the estate as probated and the transfers. It can't prejudice the government's case in any way. It is already in evidence.

MR. CARPENTER: You are offering it for that limited purpose, are you?

MR. VAN FLEET: Yes; I am offering it for all purposes.

MR. CARPENTER: Then my objection still stands.

MR. VAN FLEET: It is already in evidence in the case.

THE COURT: Is it a matter that affects the amount?

MR. VAN FLEET: Yes.

THE COURT: —by any possibility?

MR. VAN FLEET: Yes.

MR. CARPENTER: I will withdraw my objection to its being offered for the limited purpose of showing what value the commissioner placed on the property which was trans- [56] ferred and also to show the value of the property in the entire estate; but as to any other purpose or matters for which counsel might be offering it, I stand on my objection.

THE COURT: The objection will be overruled.

MR. CARPENTER: Exception.

THE COURT: It is admitted for whatever it may be worth.

(The document was thereupon marked Defendants' Exhibit "A" in evidence.)

MR. VAN FLEET: Now I offer in evidence the notice of adjustment of all these claims under which the money was paid back to all these defendants, if your Honor please.

MR. CARPENTER: Objected to for the reason it is not within the issues of the case as it is admitted by the pleadings.

MR. VAN FLEET: If your Honor please, it is the basis of the whole claim of the government, and of our claim that there was no mistake. This is the allowance of the claim for refund, the final allowance if your Honor please.

MR. CARPENTER: That is admitted.

MR. VAN FLEET: That doesn't make any difference whether that is admitted or not. It is proper to put it in the record to keep the record complete.

MR. CARPENTER: It is signed by the commissioner and shows that the claim for refund was allowed and paid, and shows the date of that.

THE COURT: The objection at this time will

be sustained on the ground that it is admitted by the pleadings that there was a refund. Do you desire an exception noted to these rulings, Mr. Van Fleet?

MR. VAN FLEET: Yes, your Honor. I now offer in evidence a check which was paid by the government to these [57] various defendants, and I offer it for the purpose of showing what became of the money in this case, which is one of my defenses—

MR. CARPENTER: Objected to for the same reason—

MR. VAN FLEET: This is the point we will prove. We will prove that all these checks were turned over to Mrs. Mackinnon, and she having paid the taxes in the first place, that none of the money was retained by these various defendants.

THE COURT: The objection will be overruled.

MR. CARPENTER: Exception.

(The documents were thereupon marked Defendants' Exhibit "B.")

MR. VAN FLEET: I offer the decree of distribution, which shows the amount of the estate which went through probate, if your Honor please, which has to do with my defense of transfer, that the transfer of the real property was in good faith and what the value of that was, and what the value of the estate that went through probate was, to estimate the tax.

MR. CARPENTER: You are offering it for the purpose of showing values, counsel?

MR. VAN FLEET: Yes.

MR. CARPENTER: Well, I object to it on the ground it is secondary evidence. It doesn't give us the right of cross-examination. If they want to show value they should bring the people here who are qualified to testify to it.

MR. VAN FLEET: This fixes the amount which went through probate and which is taxable.

MR. CARPENTER: That has nothing to do with this case.

THE COURT: What is this, the decree of final dis- [58] tribution?

MR. VAN FLEET: Yes, your Honor, the decree of final distribution. The amount of real property which was transferred, as we will show, was $386,000 and the estate tax was levied on that. The only amount that went through probate was $125,006.19; and, of course, if my defense is good upon the ground that that transfer was bona fide before his death, then there is no tax due. That is the purpose of offering this in evidence.

THE COURT: It will be admitted subject to being connected up later on. For the present the objection will be overruled.

MR. CARPENTER: May I have an exception?

THE COURT: Yes.

(The document was thereupon marked Defendants' Exhibit "C.")

THE COURT: Subject to a motion to strike, if it is not. Proceed.

GEORGE G. MACKINNON, one of the defendants, called as a witness on behalf of the defendants, testified:

My full name is George G. MacKinnon, I was one of the administrators of the estate of William H. MacKinnon, deceased. My brother William H. MacKinnon, Jr., was the other administrator. I paid the estate tax on this estate. The documents which you show me are my receipts.

MR. VAN FLEET: I offer this in evidence, if your Honor please.

MR. CARPENTER: Objected to on the ground that they do not come within the issues of the case; that they are admitted in the pleadings, payments admitted. [59]

THE COURT: They will be admitted subject to a motion to strike.

MR. CARPENTER: Exception.

(The documents were thereupon marked Defendants' Exhibit "D.")

THE WITNESS: The audit and review which you show me, I received from the Treasury Department on March 15, 1923.

MR. VAN FLEET: I offer it in evidence. It contains the appraisal made by the government of the value of that transfer, if your Honor please.

THE COURT: Is that the transfer referred to in your pleadings?

MR. VAN FLEET: Yes.

MR. CARPENTER: I object to it upon the ground that the value placed upon the transfer as shown by the return is the best evidence.

THE COURT: The objection will be overruled.

MR. CARPENTER: Exception.

(The document was thereupon marked Defendants' Exhibit "E.")

MR. VAN FLEET: Q. But, as I understand you, the government put a value on the transfer which was made by your father before his death to your mother, and the real property contained in that transfer is not contained in the decree of distribution. That is merely to point it out to the court, if your Honor please, and the jury.

THE COURT: Isn't that shown by the reports and the records?

MR. VAN FLEET: I suppose it is, if you read that word "transfer" in that way. I wanted to bring that out.

MR. CARPENTER: I object on the ground that the records are the best evidence. [60]

THE COURT: I think that probably is true, but I will overrule it, to clear it up.

MR. CARPENTER: Exception.

THE WITNESS: A. No, the transfer was not included in the final decree of distribution.

I am the son of Mr. William H. MacKinnon. My father died January 16, 1921. I saw him right up to the day that he died. At that time he told me he had transferred certain of his properties to my mother. He told me that about the middle of December, 1920. I had conversations with him previous to that time with reference to transfers to my mother; he spoke off and on for ten years before that about making transfers. I don't recall just when and where it was,—off and on. One conversation he told me about, at my father's home; my mother was there, my wife was there and myself; that was about I should judge the 14th or 15th of December, 1920. I can't pin myself down to a particular date, or who was present; I don't remember.

MR. VAN FLEET: Q. Well, at that time, knowing the date when he paid off the mortgage,—do you remember that date?

A. I can't recall it—it was sometime during the year—the latter part—I think it was in November, 1919.

Q. Well, what did he state to you at that time and who was present.

A. I don't think anybody was present, except he and I.

Q. And what did he state to you at that time?

A. That as soon as he got all the properties clear—

MR. CARPENTER: Just a moment. I object to that on the ground that it is too far remote in point of time to show the condition of the testator's mind.

MR. VAN FLEET: Well, it was in November, 1919.

MR. CARPENTER: And he died in 1921. [61]

MR. VAN FLEET: He died in 1921, yes.

MR. CARPENTER: And the transfer was made a month before his death.

MR. VAN FLEET: And we can show the course of his mind, of his intentlon, in the testator's mind for several years back, under the authorities.

MR. CARPENTER: I take issue with you on that.

THE COURT: Objection overruled.

MR. CARPENTER: Exception.

MR. VAN FLEET: Q. And what was that conversation?

A. That he intended to deed certain properties to my mother.

MR. CARPENTER: I object and ask that the answer be stricken out, and I ask that the witness be instructed to state just what the conversation was, not give his conclusion of what it was.

THE COURT: The answer may go out; and state the conversation, as near as you can recall it, just what he said.

THE WITNESS: Well, he told me that he in-

tended, after certain things were cleaned up, to deed certain properties to my mother. He had been telling me that for ten years.

MR. VAN FLEET: That last may go out, if your Honor please.

THE COURT: With respect to telling him that for ten years, that may go out, and the jury is instructed to disregard it.

THE WITNESS: At the time that my father made this transfer to my mother, I think it was some time in December, I was in Oakland; I was not present at the time it was made. As to the state of my father's health at that time it appeared to me like he always had been, well and healthy. He never [62] said anything to me about his health.

MR. VAN FLEET: At about that time were you contemplating a trip with your father?

A. Yes, I was contemplating a trip. He wanted me to take him on a trip.

Q. Where to? A. Fresno.

Q. And just what time was this?

A. I was playing cards with him on Saturday night, on the 15th of January up to half past eleven at night and then he made arrangements for me to take him to Fresno on the following Monday.

MR. CARPENTER: If your Honor please, I ask that the testimony as to his state of mind subsequent to December 15, 1920, be stricken. The witness is now testifying to the deceased's actions in January, just prior to his death.

MR. VAN FLEET: Well, under the authorities, if your Honor please, the declarations of the donor and the circumstances surrounding the gifts can be made both before and after the transfer.

THE COURT: That is more with respect to his health rather than state of mind at that time. The objection will be overruled.

MR. CARPENTER: Exception.

THE WITNESS: My father was at the family dinner on Christmas day, on December 25, 1920. My mother and father, and my wife, myself, and I think little June DeLancey were there. She is a granddaughter. And I don't know, my sister Fanny, and Willie, was there, and my father sat at the table and carved the turkey and was the whole life of the party. In fact, he opened a bottle of champagne on the strength of the Christmas dinner, and drank it,—drank a little himself. Thereafter, about January 10th or along in there he was taken ill. They called in the doctor. The doctor was there. I think it was Dr. Coiter. That was 1921; and [63] he died January 16, 1921. I was not with him at the time that doctor was called in; I happened to be up there once when the doctor was there; that is how I found out the doctor was called in. That was the first time I knew of a doctor having been called in for him. At the time of his death my father was 63 years and 11 months old. He was a man that weighed, oh, probably 275 pounds. As far as I know during the last year before he died he was as active as he had been for the last ten years. At the time my father died, I was at my home. The last time I had seen him before that, was the night before; I left him about half past eleven after playing cards with him up to that time. He did not say anything at that time about the transfers he had made to my mother. I received the check which you show me made payable to the order of George G. MacKinnon, heir of William G. MacKinnon, $1410.00, and signed

by the disbursing clerk of the Treasury of the United States. I endorsed it and turned it over to my mother. I never kept any of the money. I turned it over to my mother because she paid all the taxes in the estate and if there was any comeback she was entitled to it.

CROSS EXAMINATION.

I don't know that Dr. Shannon had ben attending my father all during the year 1920; it might have been possible that he may have and I might not have known of it; I was not living at the same house with my father. My father never complained of his health to me, never. He never would complain about his health, other than the gout, he used to complain about that. I was present the night before his death. The last time prior to that time that I was present with him was probably the Tuesday or Wednesday before that. [64] That would be three or four days before his death. So, that with the exception of being with him the last night before he died, I don't think I was with him for three or four days before his death. The night before he died, I was there from probably half past seven to have past eleven. On the previous occasion I was there about the same time. I went up to play cards with him in the evening. I don't know the exact date when Dr. Coiter was called in. When I visited my father on the last evening prior to his death, he was not in bed. As to whether Dr. Coiter is an expert diagnostician from Oakland with offices in the Franklin Building, I couldn't answer that; I don't know. With reference to the time I was there on the last occasion, my father died the next day, I think, about one o'clock in the afternoon. I don't know of my own

knowledge what time he went to bed for the last time; I guess he went to bed after I left him. I don't know. I don't know of my own knowledge of his having been in bed all day on any previous occasion. I think he had one nurse attending him for the last three days; it couldn't be possible that there were two nurses attending him during the last three days of his life on earth without my knowing it. I think he had one nurse there a day or two; I think a day or two before he died; as far as I know it was only one. I don't know who called the nurse. I should judge when he died, my father weighed probably 260 pounds. He was a man who weighed upwards of 300 pounds at one time, then he went down to about 275 pounds. I think that is his weight. He lost probably 25 pounds in the five years before his death. I don't know but I should judge he weighed about 260 or 275 possibly at the time he died. He had been weighing that much probably [65] for five years before he died. I never saw the nurse personally attending my father. I never knew he was in bed. I never saw him taking any treatments of any kind. I don't know who it was that called Dr. Coiter in; it was probably my mother. As to my being sure it was not Dr. Shannon, I couldn't answer that; so far as I know it might have been anybody, I don't know. I fix the date for the transfers that I speak of as being around the middle of December because it kind of shocked me when they told me what he did and I didn't forget about the date when he told me. I am fixing that by reason of the dates on the deed.

RE-DIRECT EXAMINATION.

I tried to have the Government make the whole check payable direct to my mother, and I took it up with them and wrote them letters in Washington. The documents you hand me are the letters and the answers to them, or copies of them, some of them. They are letters from the department to me and copies of my letters to them.

JOHN S. DeLANCEY, called as a witness on behalf of the defendants, being first duly sworn, testified:

I am an attorney at law. Mr. William H. MacKinnon was my father-in-law. My daughter is June DeLancey; she is one of the heirs of the estate who is being sued here; I am her guardian. I remember when he died in 1921. Previous to his death in 1921, I had been handling his property for him, for a number of years I had been assisting him and working with him, I guess ten or twelve years; somewhere in that neighborhood. He asked me to make out deeds to the various properties to Mrs. MacKinnon, Mrs. Pusey now. I did that. [66] The documents which you hand me are the deeds, seven of them, which I made out. I gave them to Mr. MacKinnon. I was not present at the time that he transferred them to his wife. I was there when he executed them, although not when he acknowledged them. He executed them at his home; I brought them up to his home. That is his signature on each of them and that is my signature there, signed as a witness. I afterwards recorded them. The deeds are dated December 13, that is when I made them out; I saw him on that day; I think it

was the first thing in the morning, about nine or ten o'clock. I believe that is when he signed them. He did not acknowledge them at that time. He acknowledged them subsequent to that. Yes, I had a conversation with him at the time I made out the deeds for him. Mr. MacKinnon and myself were alone. He asked me—he wanted to give his real property to his wife, in the various counties, and he asked me to bring up the deeds, make them out and bring them up to him. I brought up these deeds, which are in rather peculiar form and we had a discussion about them. He executed them and put them in the drawer at his home. He had never discussed with me the purpose of executing these deeds before that time.

MR. VAN FLEET: Q. Did you ever have any conversation after the deeds were executed?

A. Oh, yes, I did.

Q. Where was that and when and who was present?

A. When he acknowledged the deeds, I don't remember the date. I was present and he says, "John, I am now a pauper."——

MR. CARPENTER: Just a minute. If you are asking for the conversation that took place I would like to urge the objection I made formerly, that it is coming after the transfer was actually made, that it is inadmissible to show [67] the state of mind of the testator at the time the transfer was actually made.

THE COURT: The objection is overruled.

MR. CARPENTER: Exception.

MR. VAN FLEET: You may answer.

A. He says, "I am now a pauper. I have got to depend upon"—I forget just what he called Mrs. MacKinnon, but he was speaking of his wife,—"I

have got to depend on her for anything I want from now on."

Those properties were bringing in quite a little rent; quite a good deal. I don't know what became of the rents of that property. Some of the rents I collected and I turned it over, but somebody else collected the rents; I don't know who it was. That was before he died. They we coming due at odd times, you know. He had a bank account at the Oakland Bank of Savings.

MR. VAN FLEET: Q. Did you have any conversation with him just before he died? A. Yes.

MR. CARPENTER: Just a minute; who was present and when did it take place?

MR. VAN FLEET: Q. Just before he died?

A. There was a nurse present; she was in and out of the room. I think the nurse was out of the room and Mrs. MacKinnon, Mrs. Pusey, now, was in and out of the room. I was talking to him. That was the morning of his death, and that is all that was present.

Q. Where was he at that time?

A. He was sitting in a chair in his room and talking to me.

Q. And did he say anything at that time about an impending demise or that he was expecting to die?

A. No; he was not feeling well, and he stated he would like to see another [68] doctor and I told him that I would make an arrangement to take him to the city the following day, or would make an arrangement to have Dr. Moffatt of San Francisco come and see him.

MR. CARPENTER: If your Honor please, may it be stipulated that my objection—otherwise I would have made an objection to this question—that my ob-

jection to all the declarations and conversations had with the testator after the alleged transaction was made, be considered and deemed to be objections to all the rest of the line of testimony in this same case?

THE COURT: It may be so understood and an exception noted without further objection.

MR. VAN FLEET: Q. Had he ever been ill before, to your knowledge?

A. No; the usual colds. He used to get heavy colds, but that was all.

Q. Had he been active in his business affairs before that time?

A. Well, he was not very active for a number of years. He would get down to his office late and he would go home early. He didn't give much active attention to it for the last few years prior to his death.

Q. You say that before that time he had never discussed with you the deeding of his property to his wife?

A. Not prior to his asking me to make the deeds out.

Q. Oh, by the way, when it came to the probating of the estate, the heirs never contested this deed, did they?

MR. CARPENTER: That is objected to as immaterial and not within the issues of the case.

MR. VAN FLEET: It is for the purpose of showing the heirs all accepted the fact that the father transferred the property to his wife. [69]

THE COURT: Objection overruled.

MR. CARPENTER: Exception.

A. No. I accepted the fact that the property had been transferred to his wife. I represented my daugh-

ter, and she would have had a considerably larger interest.

CROSS EXAMINATION.

I drew the deeds almost immediately upon receiving instructions to do so. It was not on the same day; I think it was the previous day that he told me to do it, and I think it was the following morning before I went down to my office that I brought the deeds in to him. At the time he gave me those instructions, I saw him at the house. He did not call me there; I visited there every day, nearly every day. I was at the house. My daughter lived there at their home, you see. I was not living there. I went over this morning one day prior to the time that the actual handing over of the deeds took place. No, I won't say at that time he gave me instructions to draw the deeds. I was there every day. I was at that house every day and he told me to draw the deeds, and the following day I brought the deeds up. No, I wouldn't say that the deeds were actually handed over to Mrs. MacKinnon on one day and the instructions to me to draw them were given to me on the previous day in the morning. I am not certain of the day they were handed to Mrs. MacKinnon. I was not present at the time. I think probably the instructions to draw the deeds were given to me on the 12th of December. Those instructions were given to me by Mr. MacKinnon. I don't think he went to work that day. He would ride down to work in the machine, but that had been so for a period of a year, but not from illness. [70] Yes, he had been going down to the office, but some times he would come down for an hour or two and some times he would come down and stay longer; but some times he would not appear for

two or three days. The last time that I know, of my own knowledge, prior to the time that the actual deeds were made out by me, he visited his office I think about two weeks before he died. I know that because he went out and got a haircut and went around to the office and then went back home; I was not with him. I would say that the last time I remember him being at the office was probably the early part of December. That, I assume, but I was not always at the office. At that time he weighed in the neighborhood of 300 pounds. He always was a man of that weight; a very large man. He did not weigh any more subsequent to that time and prior to his death; I think he was slightly lighter, not much, but slightly lighter than he had been, because he had been dieting for some time; that is, he had not been eating so much for some time; but there were times when he weighed as high as 340. I think some ten or twelve years prior to his death he weighed as much as 380; I think that is the maximum weight I heard he had acquired. I remember of testifying at the former trial here; I don't remember of giving the impression at the time he made out these deeds he was a man weighing 380 pounds, but I probably did; I might have given the impression that he was a very exceptionally heavy man.

When I spoke of not having been present when the deeds were acknowledged, acknowledging a deed is going before a notary public and attesting your signature to be genuine. I would say that at the time he made out the deeds he had a heavy cold, had a cold about that time. [71] I visited the home and saw him nearly every day for years, I guess, and just prior to his death. Well, he had had an attack of gout;

when I said he hadn't been well before that time, I had overlooked the fact that he had had an attack of gout and was confined to his house on account of the ailment and he was confined for quite a period of time. The symptoms in connection with this gout—you know—his toe had swollen up and he had it wrapped up and he would keep it up on a chair. I did not notice anything in connection with his breathing at that time; at the time of the execution of these deeds he was absolutely normal, outside of, as I say, of a cold, as far as was apparent to me. Well, I don't know that at any time subsequent to that and up to the time he died, within that month, that he experienced any difficulty in breathing; I can't remember that he did. It is possible that he did; I can't remember that, but if it was it was just shortly before his death, because I know they got the nurse in about a week before he died, and at that time he was confined to the house. He had two or three doctor friends, —Dr. Shannon was one of them. I don't think he had been calling regularly; he may have and I not know about it; they were friends; they went off on trips together, personal pals. I knew that Dr. Coiter had been there because I had been told, but I did not see Dr. Coiter there. They told me Dr. Coiter had been in, and, as I told you, I had made arrangements to see Dr. Huntington over here or Dr. Moffatt, this big doctor over here, myself. That was the morning he died. The morning he died he was sitting up in a chair; he did not have his foot propped up; I don't believe there was anything the matter with his foot at that time. The symptoms were not very apparent. He just simply [72] said he didn't feel good, and if I could arrange it he would like to see somebody, and

I suggested he see Dr. Moffatt, and we were talking just casually; everything seemed to be all right. I think just about a week before he died Dr. Coiter was called in, or that is my information on the subject. I don't think it is possible that he might have been there since the 30th day of December, because when Dr. Coiter came in I think he ordered a nurse; the nurse was there about a week; that is my reason for saying Dr. Coiter was not called in until December 30th. I said Dr. Shannon and Mr. MacKinnon were personal friends and Dr. Shannon's being there would not mean anything to me. He was not there. I wouldn't say that my visits were confined to short visits once a day. I played cards and talked to him. He was a mighty fine father-in-law and I liked to stay and talk to him.

I was not working at the time; I did not have any position nor was I practicing my profession. I had an office with him. During the last week of his life, I saw my father-in-law at his house probably every day for an hour, maybe a little longer. The visit I had with him the last day, I was with him probably an hour before he died and was there with him when he died. That was the same visit. I did not notice any acceleration in his breathing; he was sitting in the chair. He was not having any trouble trying to get his breath. While I was there the nurse did not give him any treatments or any medicine; the nurse didn't even come into the room excepting to look in and go out. He was covered with a blanket over his knees. He was not delirious. He didn't want to go to Fresno with me. I was going to go over to the city and see Dr. Moffatt the following day. I believe that was Monday. I am not positive of the day but [73] he died on a Saturday morning, I think he died, and

I was going to the city the following Monday morning. At the time he was sitting in the chair, I don't remember whether the bed was made up or whether it was ready for him to get back into bed as soon as he desired to. I don't remember how long he had been sitting there in the chair; he was sitting in the chair when I got there and he died in the chair. His head dropped forward and he died. When I saw him the day previous to that he was sitting in that chair too. I don't know if he had the robe over his knees; but he invited me to come to dinner that night. The day prior to that and several days prior to that it is my recollection that he was in the chair then. He didn't want to discuss anything about his own personal feelings, and he didn't do so with me any more than with anyone else. He was a man who was naturally a man who was averse to complaining about his own condition, particularly as to physical conditions. He prized himself on always having been a well man. I would say he was the kind of a fellow, if he had been ailing, would try to keep it from other people. We had so many things in common to talk about that I don't remember he discussed doctors with me during any of the visits I made during the last week, but this particular time that we had a talk about Dr. Moffatt and I believe that was my suggestion to him rather than his suggestion to me.

Mr. MacKinnon was so stout it would be hard to judge how tall he was; he was taller than I am, probably two inches taller than I am; I am five feet, nine.

I don't know if the Oakland Bank of Savings is the only bank he had any money in during the month of December, 1920; that would be my recollection. If he had any in any other bank, it would be a minor

amount. That was the large [74] bank account where he kept his funds.

I never received any money from the government for my daughter. I am a defendant on behalf of my daughter, as her guardian. I, naturally, was sued. I received a check for fourteen hundred and some dollars and gave the check to Mrs. MacKinnon. I am still her guardian. Sure, I endorsed that check as her guardian; I probably would have had to endorse it to cash it. I paid no money to the Commissioner in reference to my ward at all.

I did not notice on any of my visits that the deceased was having any difficulty, which was apparent to me, with the functioning of his kidneys.

RE-DIRECT EXAMINATION.

The check you show me is the one I received from the government, a photostatic copy of it; it is endorsed just exactly as it is made out on the face of it, by me. I turned it over to Mrs. Pusey immediately.

J. E. SHANNON, called as a witness on behalf of the defendants, being first duly sworn, testified:

I live in Berkeley. I have been a practicing physician in Berkeley and Oakland for thirty odd, about thirty-five or thirty-six years, I don't remember exactly. Since 1893, however. General medicine and surgery. I knew Mr. William H. MacKinnon during his lifetime. I could not say definitely how long I had known him; I would say fifteen or twenty years. I was not closely acquainted with him during that time, but for seven or eight years prior to his [75] death I was. We were very close friends during that period.

I was partially, not totally, the family physician during that time, because I think there were other doctors who were called in at times. I think the last time I saw Mr. MacKinnon before he died was on the—well, as I remember, on the 24th of December. He was well with the exception of a cold that he complained of at that time. I don't think I had any conversation with him at that time with regard to his business affairs; I don't remember. I had a conversation at his home, I don't know that anyone was present. He told me that he had deeded his property to Mrs. MacKinnon and he told me that he had made a deed,—he called it a blanket deed. He said his lawyers had said it was no good, but he said "the lawyers didn't know it all," kind of joshing. Before that time, say before the 15th of December, 1920, I don't think I had seen him very frequently, maybe every week or such a matter. The conversation I have already related is about the extent of the conversation we had relating to his property or his business affairs.

We frequently traveled to Fresno together. He had interests there and I had interests there, but our business was not connected in any way. There was no trip that I remember of, to Fresno a short time before he died or near that period; some time before that there was.

During this period, with reference to his health, I never discussed that with him; sometime probably along about the middle of December, 1920, as near as I remember, I called at his office and I advised him to go home. He had a very cold office, and I saw he had some cold and I told him he better go home and take care of himself. That was the extent of my advice. I volunteered that. [76]

I was not there at the time he died, nor was I in

attendance on him at that time; I was in Fresno County. I did not call in another doctor; I did not call in Dr. Coiter. On the 24th I was called very hurriedly down to the ranch I had and I went by and told him I was going to be out of town. He usually expected me to call or see him or something of that kind. We were very particular friends and sometimes played cards together. That was the 24th of December, and I told him that Dr. Miliken would take my place while I was away. He was not in bed at that time. He was not out of the normal at that time when I saw him on the 24th of December. I never discussed with him his sudden death or impending death in any way whatsoever, nor did I ever tell him he was in danger of dying suddenly. I do not know what he died of. I was not expecting him to die, particularly. I did not tell him as his family physician, that he had better take care of his affairs, that he was in danger. I would say he was of a cheerful disposition. He was rather inclined to be reticent about his affairs.

CROSS-EXAMINATION.

I did not expect him to die. I testified on the former trial of this case.

MR. CARPENTER: Q. And where the court asked you? "You didn't inform him he was suffering from any fatal illness, did you?" "A. No."

"Q. Was he?"

"A. Well, I would not say that, except that his physical shape, he was an exceedingly stout man, and I was not surprised, you might say, that he went off as he did." [77]

I so testified. That was correct, I was not surprised.

My testimony a few minutes ago was not incorrect; I did not explain any reason. I would not be surprised owing to his physical condition,—being an excessively fat man and not very active physically. We are never surprised with that kind of a man dropping off suddenly, either from heart trouble or apoplexy or any of those things that carry people off suddenly.

That is not the reason I told him that Dr. Miliken would look after him after I left. I merely told him that in case the family needed me. Dr. Miliken was representing me. If anyone was sick he would attend to the case and he would return the case to me after I returned. That is, in case I was called; and if they called another doctor outside of me, he would not have any reason to return the case to me.

I can tell you the symptoms of myocarditis to some extent. I might not be able to go through the whole series. As far as I know they are rapid pulse, a weak pulse and temperature; those are the main symptoms. Not necessarily rapid breathing nor accelerated breathing, unless there was some effusion accompanying it, which does occur occasionally. Not necessarily kidney trouble complications; some times they are present. Well, I have known people in that condition where the mind was not as clear, and I have known of them to go without any evidence of the mind being clouded. Myocarditis is inflammation of the muscles of the heart. It has a general weakening effect upon the rest of the body. It is a very serious disease. A person who died of that ailment I think would know that he had it and would be expecting death most any time. I have no reason to believe [78] from my attendance of Mr. MacKinnon, the deceased, during the month of December, that he was suffering from

myocarditis. I don't think I ever heard afterwards that that was the cause of his death as pronounced by any doctor, or had any report or heard anything definite. I did not talk to Dr. Coiter after my return. I don't know that Dr. Miliken was called at all. The condition that I thought would cause him to drop dead so that I would not be surprised of the fact of his having done so was owing to the excessive fat, I would have suspected more of a fatty degeneration in his condition than inflammatory,—a fatty degeneration in which fats take the place of the muscles of the heart and the heart weakens by that change. I would have suspected something of that kind. I could not tell you how long I had been thinking this; I don't know that I even though of it otherwise than the man's general physical condition. A man that has fatty degeneration of the heart would not be likely to feel that death was impending in some seasonably distant future unless he was in the latter stages when it became very pronounced, he was not. I would say a month before his death.

RE-DIRECT EXAMINATION.

I saw him a month before his death; he gave no indications that he was expecting to die.

WILLIAM H. MacKINNON, one of the defendants, called as a witness on behalf of the defendants, being first duly sworn, testified: [79]

I am the son of William MacKinnon, the decedent in this case, and one of the administrators of his estate. I was with my father four days before his death. My mother, various other members of the

family were there at various times. My mother was there all the time. At that time, four days before his death, I came to the house. I had previously been in the Letterman General Hospital. I returned from there to home on the 12th of January. I had been in the hospital about two months prior to that. At the time the deeds were made, I was in the hospital. When I saw him four days before his death, he told me that he had deeded all of his real property to my mother. I returned to my home on the 12th of January, and after I had talked with him for possibly half an hour or so he said, "Did you know that I had deeded my property to your mother?" And I said yes, I had heard about it while I was in the hospital. At that time I had quite a conversation with him about his illness. There was no one present, as the conversation was principally with reference to my opinions of doctors, whether I thought he was ill, or not, seriously ill. He first asked me what I thought of doctors, and I told him that my experience with doctors had not been very satisfactory, and he said, "Well, they can make a mistake once in a while," and I said I thought so. "Well," he said, "they want me to make a trip down to Fresno." He said, "I am very anxious to go. Do you think you can go down with me, go next week?" That was the early part of the week when he suggested it to me. I told him I thought I could. Then he said, "Well, how do I look to you?" And I said, "You look all right to me," something to that effect, I can't recall any more.

I was with him the day he died. I had just gotten [80] through shaving, and we were laughing about the doctor's orders not to have him shave himself, and I shaved him, and I stepped out of a room

a few minutes, and he died while I was just outside of the room. At that time Dr. Kuder had been called in to attend him. I believe it was just previous to my return home that he was called in.

I had a conversation with him in Fresno, California, my office on Fresno Street; whether it was the year previous to his death, or two years previous I cannot recall. I had been down there about two years.

MR. VAN FLEET: What was the conversation with your father at that time?

MR. CARPENTER: I wish to object to it on the ground it is too remote in point of time, having taken place a year or two years previous to the time that the transfers were made.

THE COURT: The objection will be overruled.

MR. CARPENTER: Exception.

THE WITNESS: He said there were a few more mortgages that he wanted to wipe off before he made a conveyance to my mother. I would recognize my father's signature. I think that is his signature. I received a check from the government for a certain portion of a refund. That is a copy of the check. That is my signature on the back, and that is my mother's signature. I endorsed that check and turned it over to my mother. I did not use any of the money myself. I turned it over immediately to my mother. My father left no will.

MR. VAN FLEET: Q. Did you contest the transfer of this property to your mother?

MR. CARPENTER: Objected to on the ground that the [81] records of probate are the best evidence.

THE COURT: I think that is true. I will permit that to be answered, because it will save some time. Exception. I will permit the witness to answer, notwith-

standing the records are the best evidence, unless there is some further objection to it.

MR. CARPENTER: The further objection to it that it is entirely immaterial, not within the issues of this case, whether this man contested the proceedings in the probate court, that has not got anything to do with the question of whether or not the property was transferred in contemplation of death.

THE COURT: The objection will be overruled and an exception noted.

MR. CARPENTER: Exception.

THE WITNESS: A. No, I did not.

MR. VAN FLEET: What was your attitude with regard to the transfer?

MR. CARPENTER: Objected to on the ground that it does not make any difference what the witness' attitude was.

THE COURT: Objection will be sustained.

MR. VAN FLEET: Q. Did you consider at that time that the transfer to your mother was an absolute gift?

MR. CARPENTER: Objected to on the ground that it calls for a state of mind of this man, that it has no bearing on the issues of this case, and, furthermore, it is in the form of a conclusion.

THE COURT: The objection will be sustained.

MR. VAN FLEET: Q. Just what happened with regard to the proposition of testing the transfer to your mother?

MR. CARPENTER: Objected to on the ground the records [82] are the best evidence.

THE COURT: He has already answered he made no contest.

MR. VAN FLEET: Q. If you had made a con-

test of the transfer to your mother, would you have benefited by it?

MR. CARPENTER? I object to that as a hypothetical question, based upon facts that are not involved in this case, and it is not within the issues.

THE COURT: The objection will be sustained.

MR. VAN FLEET: May I take an exception to your Honor's ruling?

THE COURT: Yes.

MR. VAN FLEET: And an exception in regard to your Honor's ruling on the motion for nonsuit, I don't know whether I put that in the record, or not.

THE COURT: The exception will be allowed.

MR. VAN FLEET: Q. All the money that you obtained from the estate came through probate?

A. Yes.

Q. The real property that was conveyed to your mother by your father, you received none of that, did you, after his death?

MR. CARPENTER: Objected to on the ground that the deed or the transfers are the best evidence.

THE COURT: I will permit it to be answered. Exception.

MR. CARPENTER: Exception.

THE WITNESS: A. I received no portion of the real property that was conveyed to my mother.

MR. VAN FLEET: Q. Why not*e*?

MR. CARPENTER: That is objected to. [83]

THE COURT: The objection will be sustained.

MR. VAN FLEET: Exception. That is all.

CROSS-EXAMINATION.

Prior to my father's illness, if I remember correctly, I went in the hospital in the early part of November, and I left, I believe, on the 12th of January the following year. This conversation regarding the trip to Fresno was on the 12th; I returned in the forenoon of that day. That conversation took place in my home in Piedmont. I had been living in Fresno. I came up from Fresno to the hospital and then when I was released from the hospital I went over to father's home in Piedmont. It took place in my father's bedroom in his home. He was sitting in a chair looking out the window. There was no difference in his physical appearance. I had not seen him, you see, prior to his attack of the gout, or during his attack of gout. I was in the hospital at that time. I don't recall that any particular part of his anatomy was swollen. I knew that he had been laid up with the gout, but I cannot positively say whether his foot was propped up or not; in all probability it was. I can't recall whether he had any covering over him at that time. Except for daily visits to the hospital I stayed at home from that time on. I sat up with him practically every night from the time we finished dinner, sat up in his room, because we seldom went to bed earlier than twelve o'clock. I could not say exactly what time he retired the first day I returned on the 12th of January; it was substantially around twelve o'clock. I retired at that time also. I did not hear him get up after that. I don't know that he did. There was a [84] nurse there with him at that time. She was with him all night. I did not see the nurse

administer any treatment to him during the time that I was there. I can't recall that she administered any medicine; I can't recall if any kind of treatment, except there was an electric vibrator there. I don't recall where that was applied; I merely saw it; I never saw the treatment given; I saw the vibrator there, and I assumed that that was used for him; whether it was for his foot, or not I don't know.

I was there at the time he died. I had never heard of Doctor Kuder before until I saw him in the home. I was not there when he was called in, nor when the nurse was called in; I don't know who called either. I imagine they were there about three or four days before I returned. I base that imagination on a mere recollection of events that took place. I can name one of those events; my siste*d* visited me in the Letterman Hospital, and I asked why father had not been over to see me the last few days, and she said that he was laid up with a cold and with the gout. He had had attacks of the gout many times prior to that time. I don't remember that a cold would accompany them; he was subject to colds quite often. He would not cough; it was more of a cold in his head, and not in his throat or lungs. I don't remember, he might have done some coughing. I would not say that this cold continued during all the time and up to the time that he died. My recollection of the whole four days does not make the cold stand out, at all. If it had been bothering him it would have stood out, I believe. I don't recall that he had any difficulty with getting his breath. While I was there he left the room at times; he went into the bathroom. His room was on the second floor;

the dining [85] room was on the lower floor. During the four days that I was there he did not go downstairs, not to my recollection. Other than the bedroom that he was in while I was there those four days, he went into the bathroom. Nothing abnormal about it that I can recollect; he went in the bathroom three, or four, or five times during the whole day and evening. The nurse did not take care of him with respect to going to the bathroom, in fact, he laughed at me one time in respect to that. The nurse was an efficient nurse, conscientious. I am not sure, but I thought her name was MacKinnon; whether that is the same nurse that I have in mind, or whether it is a nurse we had some other time, or not, I don't know, but I know there was a MacKinnon there, and I thought that was the time.

This money that I received from the government in the form of a check I did not pay any of that money back to the government; I gave it to my mother. The only reason that I do not think that the doctor was called in prior to a few days prior to his death was the fact that this sister of mine called at the hospital and told me that doctors had been called in and a nurse; I don't know of my own knowledge. I do not recall having seen Dr. Shannon there. I have met Doctor Milliken at his home. Many times prior to the time I went into the hospital, I saw Doctor Shannon at my home, recently, in the year 1920. Practically every time I would come up to Fresno to visit home, I would either drive up with father and Doctor Shannon and naturally would have dinner at home, or something like that. Doctor

Shannon had an office at that time. I never went to the office with my father. [86]

RE-DIRECT EXAMINATION.

I paid this money over to my mother because mother had paid the entire tax to the government, and, naturally if there was a refund, I figured that money belonged to her, and not to me. My father's weight in 1909, I believe, in 1908 or 1909, reached the highest point at 350 pounds; I was very conversant with the fact, because he was taking treatments, and I went out with him to one doctor, Dr. Merrill, in Oakland, and the doctor treated him until he had reduced his weight to about 285. Then he ranged between 275 and 300 pounds up until about the time of his death.

My father had been practically retired from active business for a number of years, I would judge a matter of seven or eight years. He had no regular business hours. Sometimes he would go down to the office at ten or eleven o'clock, and sometimes he would not go down in the forenoon at all. That was over a period of seven or eight years. When he gave up active business and just took care of his own personal property, he had no definite business hours at all. If he felt inclined to go down to the office he would go down and if he did not he would not go. That took place over a perid of seven or eight years prior to his death.

RE-CROSS EXAMINATION.

When I was speaking of my father's habits in

respect to going to the office I did not have reference to that time that I was in the hospital, I had reference to a period of some seven or eight years. I believe I went to the hospital some time in November. Between the first of the year 1920 and up to the time that I went to the hospital, say the first [87] part of November, 1920, I do not know how often during a week in the first part of that year, my father went to the office. I did not live here all during that year; I was living in Fresno.

FURTHER RE-DIRECT EXAMINATION.

My father had a small office on the ground floor in one of his buildings located on San Pablo Avenue near 22nd Street, in Oakland.

MRS. FRANCES COIT, one of the defendants, called on behalf of the defendants, being first duly sworn, testified:

I am the daughter of William H. MacKinnon, the decedent in this case. At the time that he died I was living in his home; I lived there from May, 1919, until about 1922. As to my father's habits during that time with reference to his business, he went to his office nearly every day because I drove him. He left the house at different hours in the morning, probably ten or eleven o'clock, and he would come home at luncheon, and then go back probably at two o'clock. I was there at the time he died; I don't know just where I was in the house, I was not in the room, but I was in the house. At the time he died he was sitting up. I was not there at the time he delivered these deeds to my mother. I don't know where I was at the time, I was not at home.

I can't remember that I ever had any conversation during this period, either before or after he made these [88] deeds to my mother, as to the disposal of my father's property. He never discussed his business with me at all. He never discussed it with me after he deeded the property to my mother othe*n* than saying he had deeded the property. He said that at home, but I don't remember just when, it was before he died. I could not say definitely, but I think Doctor Kuder came in about the first of the year, I could not say definitely the dates, it was around the first of January. He was called in because my father was not feeling well. He did not prescribe, because my father and Dr. Kuder did not agree. I believe he prescribed for him afterwards; he came back and then he ordered a nurse. He ordered a nurse, I would say a week or ten days before my father died, anyhow, because when Dr. Kuder first came my father and Dr. Kuder disagreed, and Dr. Kuder said he would not doctor him if he did not do what he said; my father thought he could get up and go around in an automobile, and Dr. Kuder said no, if he was going to do that he would not be his doctor, and then a few days afterward my father called him in again, and when he ordered the nurse my father accepted his viewpoint. He only had one nurse. I do not know whether he contemplated a trip to Fresno just before he died. I received a check for a certain portion of this refund from the government.

MR. CARPENTER: I will stipulate that she received it and endorsed the check over to her mother.

MR. VAN FLEET: And that she did not benefit by any of the money?

MR. CARPENTER: Yes, I will stipulate to all of that. [89]

CROSS EXAMINATION.

My father was not in the habit of discussing his ailments with the members of his immediate family during his lifetime. I have no recollection of his being sick, other than having the gout, before. He had attacks of the gout quite frequently. I can't remember at this time whether he had the gout or whether it was a cold. When he had the gout he did not walk. He was walking this time that Dr. Kuder came in. Oh, yes, he was out then while Dr. Shannon was there during the month of December and prior to that time. I can't definitely say when was the last attack of the gout that he had. I could not say that he had any in 1920, the year before his death. I could not say definitely when he developed this cold. I know that before Christmas he had the cold, we did not think anything of his having it. He just complained of having a cold; I don't remember that he coughed; I know that he sneezed because he used to do that often. I think the cold seemed to get better, because he seemed to be fine Christmas day. My mother called Dr. Kuder. I think Dr. Milliken came in a few days before Christmas. He was the one that said he had a bad cold. He only came once, and then some friends came in after Christmas and spoke to father and said, "Well, why don't you see Dr. Kuder, he is a good doctor." We had not heard of him, or did not know him, or anything. I don't remember the last time we had Dr. Shannon, that seemed a long

time. Yes, I am sure that was away in the early part of December. Dr. Shannon was a friend, and he was there. During the month of December, my father did not go to the office every day, but he went to the office; I used to take him out, I used to [90] drive him around, but I would not say he went every day. I could not say how many times a week during that month he went to the office either; sometimes he would go out and not go near the office at all. That was true of the month previous, November. My brother was in the hospital then. Often we would go out and not go to the office at all. As far as I was concerned he kept his affairs pretty well to himself. I believed he discussed his affairs with my brothers, but he never did with me; I was never present when he did that, not that I can remember. Of my own knowledge I don't know that he ever did. I was there the last four days prior to my father's death; the nurse came in prior to that time; I can't remember *with* she did in connection with caring for my father, but I know he never wanted any body to wait on him. Those last four days he was not in bed during the day time; I never went into his room when he was in bed at night. He generally sat up later than I would; he most generally stayed up late, and there was generally someone in in the evening. I never had occasion to make his bed; he was not an early riser; he would get up at possibly nine o'clock; I really could not remember definitely if that is about the time he arose during those last four days. I was in the other end of the house and I could not answer as to whether he got up during the night after he went to bed. I cannot remember of the nurse giving

him any medicine at all. I saw her take his temperature; I believe it was in the morning and at night. I know that they kept a record of it there, kept a chart. I do not know what became of the chart. We always thought my father died of heart trouble. [91]

RE-DIRECT EXAMINATION.

I never contested after my father's death, this transfer to my mother. No one of the heirs did; I accepted it as a fact.

MRS. GEORGE MacKINNON, called as a witness on behalf of the defendants, being first duly sworn, testified:

I am the wife of George Mackinnon, who has testified here, and the daughter-in-law of William H. MacKinnon, who died in 1920. I remember the holidays of 1920 and 1921. I was up there with my father-in-law at that time. I was up there three or four times a week; in the evening we used to play cards; all along, ever since I have been married. I was there during the period between Christmas and New Years. I was there for dinner Christmas. W. H. was down to dinner, and was very jolly, and he sat at the table and carved the turkey, and he opened up wine for us, he wanted us to be happy, he seemed to be very jolly, there did not seem to be anything wrong with him, just the same as he always was. The last time I saw him was the night before he died. He was there, and my husband, and my mother-in-law and myself played cards with him. We played with him until, it must have been about eleven

o'clock, in fact, I wanted to go home, it kept me up too late. He did not discuss at that time any plans that he had; he wanted to go south with us, my husband and I went south an awful lot, we were going the following Monday, and he said he would like to go down with us. This conversation was the night before he died. We were playing cards—I am not sure if it was a week before he died when we were downstairs playing cards, or if [92] we were upstairs, I cannot recall where we were; we were playing cards, and he said he was going south with us; going to Fresno; we went to Fresno and Los Angeles a great deal, and he made many trips with us, and so mother got up to go and get some lemonade or something to drink, and while she was gone he turned to George and said, "George, I have given your mother some deeds," and George said, "You have, what made you do that?" And he said, "I want mother to have anything that I have, and I want her always to be happy and have something in her own name," so at that time mother came back, and that was all that was said.

CROSS-EXAMINATION

This conversation in this card game took place the night before he died. I was here in the courtroom when my husband testified and I heard him testify with reference to our playing cards with his father on the 16th of December. If my husband said it was the night of December 16 that his father mentioned at that time that he had deeded his property to his wife, I would be willing to *ex*cept that as being the date.

RE-DIRECT EXAMINATION.

I played cards with him the night before he died. I was up in his room just a few days before he died and talked to him. At that time, the night before he died, he was contemplating a trip to Fresno. He said he would like to go to Fresno with us. He said, "I will go with you," that is, go with my husband and myself. [93]

RE-CROSS EXAMINATION.

We were playing cards so much with him that I know it was the night before he died. I am quite sure. Mother and W. H. were up there, and Mr. Mackinnon—I always spoke of him as "W. H.," and my husband and myself. Mr. MacKinnon did not have his feet propped up at the time he was playing cards, he had big heavy slippers on. I did not look down at his feet; he had a card table in front of him he sat in a big immense leather chair. I am not positive it was a week before or the night before he died, but I am quite sure it was the night before he died. It was the week before, too, and then we went up on the following Sunday, when they called in the doctor, and I said, "What are you doing up here, W. H.?" This was the Sunday before he died, we went up there about one o'clock Sunday, and I said, "What are you doing up here, W. H.?" He was in his room in the house. I remember the night before he was downstairs, because I played cards with him. That was the Sunday before he died, a Saturday night. You see, he died on a Sunday. Well, the week before, Saturday night, I was up there playing cards,

and he was downstairs in the living room. And Sunday we went out about one o'clock and he was up in his bedroom sitting in a great, big chair, and we went up there and I said, "What are you doing up here, W. H.?" and he said, "What do you think that damn fool Doctor told me"—those were the very words he used—he hated doctors, and he had not any faith in them. He did not want them near him. I was not there when he called Dr. Kuder in. I never heard him have any conversations with Mrs. MacKinnon, his wife, relative to calling the doctor in. I never saw a nurse [94] there this last night that we were playing cards. I don't know whether she was out, or lying down. The last few days he did have a nurse, during that week.

MRS. FRANCES MACKINNON PUSEY, one of the defendants, called as a witness for the defendants, being first duly sworn, testified:

I am the widow of William H. MacKinnon. He did not hand me any deeds on December 20, it was December 16. They are acknowledged before a notary, Arthur E. Scott, on December 15. I know he was there, I don't know where he was but I know he was there. My husband did not hand me these deeds at that time, it was afterwards, the next day. That is all he said, "Frances, these are yours." And I put them in the drawer. Those are the deeds. I never gave them back to him. I locked them up in a drawer. After he died I gave them to Mr. DeLancey.

(The deeds were received in evidence and marked Defendants' Exhibit "G.")

I remember the 16th of December, 1920, when he turned the deeds over to me. During the year previous thereto he had spoken to me about deeding the property, I d*a*n't remember the date. It was long before six months before he deeded the property to me, it was long before that. That is all he said, "I will deed the property to you." I suppose he was waiting to get all the mortgages cleared off, something like that, I don't know. He never discussed much business with me, anyhow. At the time he turned this deed over to me he was not feeling very good. At the time he turned these deeds over to me he was in the ordinary state of health, except he had a cold. [95]

It was quite a while after he gave these deeds to me, I have forgotten what time the doctor was called in; I think some time in the latter part of December, but he did not come to see him every day. The doctor ordered a nurse; he didn't like a nurse. I could take care of him if anything was the matter with him, but the nurse came, the doctor ordered the nurse; he didn't want the nurse, and the doctor said he should have one. I was there the day he died; I was sitting along side of him when he died; he was sitting in a chair. I heard the testimony of Mrs. MacKinnon that she played cards with him the night before; they did, they played cards Saturday night; they played cards every night, he was very fond of cards. He was present at the Christmas dinner with all his family; he carved the turkey and poured the champagne. In this estate, I paid all the taxes to the goversnment, myself. When this money was returned by the government to the various heirs they had turned all of the money over to me.

MR. VAN FLEET: After your husband's death, in the year 1923, on the 24th of February, did you give a deed of trust for this property to the Central National Bank of Oakland? A. Yes.

MR. CARPENTER: I object to that on the ground that it does not come within the issues of this case. What she did two years after the decedent's death certainly cannot enter into the issues of this case, and I strenuously object to it.

THE COURT: I assume that this is in connection with your defense.

MR. VAN FLEET: Yes. [96]

THE COURT: For the present I will overrule the objection.

MR. CARPENTER: May I state the grounds of my objection? If it is offered for this equitable estoppel, I object to it on the ground that one of the elements, the necessary element to sustain that defense, is lacking, and it cannot possibly be supplied for reasons of law, and those that both parties, both the Commissioner of Internal Revenue and the administrators representing this estate, were in the same position as respects the law. There was not any mistake of fact on the part of the Commissioner in returning this money; it was a mistake of law, and since both parties were in the same condition, it does not make any difference that the Commissioner has reversed his position, and for that reason I make my objection, and we ask for a ruling on those grounds.

THE COURT: The objection will be overruled at this time.

MR. CARPENTER: Exception.

THE WITNESS: I did execute a deed of trust

to the Central National Bank of Oakland of the real property which my husband had conveyed to me. Yes, that is the deed of trust. That is my signature. That is the deed of trust which I executed to the Central National Bank of Oakland.

(The document was received in evidence and marked Defendants' Exhibit "H.")

MR. CARPENTER: May it be stipulated that the objection that I just made with reference to any evidence on the question of estoppel stand for all testimony that is introduced hereafter? [97]

MR. VAN FLEET: Yes, you may.

THE COURT: It will be so understood.

THE WITNESS: I executed mortgages on this property in the year 1926 in the sum of $67,000.00. Those are copies I remember executing those mortgages and signing them.

MR. VAN FLEET: We offer these in evidence. These are copies. You do not object to that?

MR. CARPENTER: No, it is understood that my objection runs to all of this testimony.

MR. VAN FLEET: Yes.

THE COURT: The objection will be overruled, and they may be admitted.

(The documents were marked "Defendants' Exhibit I.")

CROSS-EXAMINATION.

It is a fact that my husband was always contemplating trips, and particularly in the last year of his life. It was on his mind all the time. He never talked about his ailments to me. He sort of guarded himself

in that respect, so that I would not know that he was feeling badly. He was feeling all right at the time he made these deeds. I remember of testifying in a prior trial of this matter, an equity action.

MR. CARPENTER: Q. Do you remember at the time that this question was asked you, here: "Q. At the time that he made these deeds had he been home more than usual? A. Oh, yes, he was home then, he was not feeling good."

THE WITNESS: A. That is right.

MR. CARPENTER: Q. "Then he was home, but he went out pretty nearly every day until Dr. Kuder came." A. That is right. [98]

Q. "And then he did not go out." A. Yes.

THE WITNESS: At the time that he made the deeds he was not feeling as well as he generally did, but I had no idea of death, or anything like that; that thought never entered my head. I was mistaken when I testified a few moments ago that he was feeling well at the time that he made the deeds. I called Dr. Kuder. I do not remember his initials. I looked up the number in the 'phone directory but I don't know what building it was. I called Dr. Kuder because I thought he was not feeling so good, so I called in a doctor to see what he would say about it. I selected Dr. Kuder because I always heard that Dr. Kuder was a good doctor and Dr. Shannon was not there, he was away. I don't know for what purpose he was an especially good doctor; I guess he was a heart specialist. I did not know that my husband had heart trouble before Dr. Kuder came; he said he had; it never occured to me. He never complained of any pain around his heart. He never complained

about anything. He had a cold at the time but his cold was better. It hung on a long time, and that kind of worried me, too, but that got better. It hung on just a few months before his death. At the time that Dr. Kuder was there I don't know that my husband took any medicines; I called in a nurse after that and she attended to him; I was not always in the room; I was in there a good deal, but I think she gave him some kind of medicine. I think the nurse took his temperature regularly while she was there; that is what the nurse was there for; I kept her in there to watch him. He did not have any swelling on his toe. He had had gout, but he did not have it so bad at that time; he had had gout for about fifteen years. I did not hear my son William H. MacKinnon testify here that Mr. MacKinnon had his toe [99] wrapped up and there was a swelling on his toe. It used to swell, but he never had it wrapped up, as far as I know. For a long, long time. He used to have the gout very bad. There was no other part of his body that was troubled with swelling—his legs a little bit. I was in the room every day the last four days. No, when in bed he would not be propped up with a pillow; he sat in a chair a good deal. He was not in bed. When in bed he would not use many pillows, one or two. Mr. MacKinnon was quite a large man. He weighed two hundred and something when he died; I think he had weighed more than that. About 275 when he died, and he had weighed over 300. He was about five feet eleven, or five feet ten and a half, I don't know which. Prior to his death he had been confined to his bedroom probably a week or so, it might have been over that, I don't know. It might have been two weeks. During that time he did not

go downstairs, not after he went upstairs; he only went down once or twice, because the doctor forbade him to go down, told him to stay in his room. When he did go downstairs, I would see him. It was not an effort for him to go down, for a big man like him. He moved around very spry. He seemed to go up slower than he had a few months prior to that; he seemed a little weaker toward the last. Yes, I think he was a little short of breath when he got upstairs. He spent most of his time in the chair. He walked around, but the doctor forbade him to. He went in the bathroom. After the doctor came he forbade him to do that, he said, "You do as I tell you." After the doctor came, after the doctor forbade him not to go to the bathroom he would sit there in his chair all day. He would change off and sit in bed or lie in bed, during the day time. Not at any time [100] after the doctor came did I have any reason to believe that he was slightly delirious; he never was delirious; he always had a good mind. I was present the night before he died; I was always there. That was the night he played cards, Saturday night. My two sons and their wives and I were present—the nurse was in bed, I think, she was not there at that time. She was on 24 hour duty. She stayed all the time. She would stay in his room. I was not playing cards; my husband and my two sons and their wives were playing, George MacKinnon, and his wife, and my husband and the other son, William. I was in the room, but not playing. I play Hearts, but this was either Bridge or Whist, either one. That was the night he spoke of taking that trip to Fresno; he spoke of taking that trip the day he died. I did not think it was strange at all; he was feeling better at that time. I did not

give him any treatment during his last illness. I took care of him. I would not help him to dress; he dressed himself. I would bring up his meals to him. For the last week or so he had his meals in his room. He was not on a diet; he ate anything.

I don't know what treatment the nurse was giving him. He used the vibrator a long time, around here—on his chest too, I guess. I never used it. The nurse kept a chart. I don't know what became of it, I can't remember.

I did not pay any of the money back to the Commissioner of Internal Revenue. The deeds I spoke of I turned over to my son-in-law. After that time he recorded them. My husband always got up once or twice during the night; he had been doing that for several months. He always stayed up late, around eleven o'clock, sometimes later. He would get up any time he wanted to in the morning, around nine [101] o'clock, unless he wanted to go out some place, and then he would get up earlier. Between the hours of twelve and nine, the time that he was in bed he would awaken and get up and go to the bathroom, I don't know how many times. This cold that he had, that first came on him around the middle of December. I don't know when the last cold was he had prior to that; he had colds, but this one hung on; he had slight colds quite frequently, a sort of chronic cold.

S. BERVEN, called as a witness on behalf of the defendants, being first duly sworn, testified:

I am the assistant trust officer of the Central National Bank of Oakland.

MR. CARPENTER: Do you wish to introduce the bank account of the bank?

MR. VAN FLEET: No. I just want to show, in the line of my defense of estoppel, the income of the estate at the time that this deed of trust was made, and the income at the present time, as completing that defense.

MR. CARPENTER: I will stipulate that the trust deed was made.

MR. VAN FLEET: Very good; and that a mortgage was put on after the refund was paid.

MR. CARPENTER: I don't know as to that.

MR. VAN FLEET: That was put in this morning. Then I want to elicit what the present income of that real property is.

MR. CARPENTER: To all of which I, of course, object, I will stipulate that that will be his testimony, subject, however, to my objection as to its materiality on the [102] grounds mentioned in the objection that I made to Mrs. Pusey's testimony in that regard.

THE COURT: That will be the understanding, that this testimony goes in under the general objection.

THE WITNESS: Ever since March 6, 1924, when I went into the employ of the Central National Bank I have been in charge of the real property under this trust deed. I know the income from it.

MR. CARPENTER: May it be stipulated that my objection goes to all of this?

MR. VAN FLEET: Surely.

MR. CARPENTER: And it may be overruled and an exception noted?

THE COURT: That is the understanding.

THE WITNESS: I have brought with me my report to the Federal government, the fiduciary return of income. This was prepared for the different years

I had to report to the government. In 1923, of course, I did not have a full report, it was only covered from February 24, 1923, up to the time the trust was created. The income has decreased very materially since 1924. In other words, in 1924 the net income, after depreciation, was $9176.78. That was for the full year 1924; 1928 was the last report we made, last year, that was reduced down, after depreciation, to $2768.71, and I could figure how it is going this year.

Those figures were made by me, except the 1923 return. I started in 1924; 1924 is when I started to work for the Trust Company. That does not have a full report for the full year 1923, because it only came into our hands February 24, so we practically only have ten months to re- [103] port on. That was the reason I was mentioning 1924. In 1923, I might mention, for the ten months period, it was $6562.05. So 1923 and 1924 would be approximately practically the same. This year, providing the balance of the year stands up as it does so far, and figuring the same repairs, and insurance, and taxes—the taxes are going to be $117.56 for the full year—in other words, the amount that she is receiving now, less depreciation, would amount to about $3400.00 and some odd; this would be about $300.00 a month; that is what we are paying to Mrs. Pusey now under the trust deed, and it is practically principal money she is receiving this year.

I do not remember the exact date when the mortgage was put on this property; I remember it was put on. There were two pieces of property—this is why the income was reduced so much—there were two pieces of property on which the buildings were con-

demned by the City of Oakland, and we had to tear these buildings down and put new buildings up, and on another piece of property the fire destroyed the buildings, so that we had to put up a new building, and in order to put up a new building we had to raise the cash by a mortgage.

CROSS-EXAMINATION.

I account for the difference between the income as of the year 1924 and of this year, in the first place, real estate conditions the last two or three years—we have a piece of property, for instance, at the present time in Fresno, when the trust originally started, we had a lease there at the time on one piece of property from which we were getting $400.00 a month; then that was vacant for a long time, and finally we rented it, and are getting $200.00 a month, and we [104] were very fortunate to get it under the circumstances. That was one piece of property. Another piece of property we were getting a good income from, but the city condemned the building. Then we had to put a new building on there on which we do not get very much more rental, and then by putting this big mortgage on, there is interest, of course, increased taxes, and that reduces the income. Another piece of property fire destroyed, and that cut down the income over $2500.00 a year. So that changed conditions. These new buildings we put up, we looked for larger rentals from, naturally, on account of the investment we put into them. Those buildings were put up in 1926.

No, depreciation did not enter into this so as to reduce income. The depreciation has been taken right along, even on the old buildings and new buildings.

That was taken even before the fire, depreciation was taken right along, so that that would not enter into this any more after it than before.

There is another piece of property, consisting of four stores on Telegraph Avenue; that property is still in the same condition; we have been very fortunate with that property, it has been rented right along; I was just mentioning the reason for reduced rental. This other property on Telegraph Avenue, we have been receiving the rental right along, just as before. There is another piece of property that is practically vacant that we are getting a small income from. The reason I was pointing particular properties out was because they are the ones that affected the income.

The Fresno property would not be the only property affecting the income. The Fresno property and the 48th Street property destroyed by fire. On the Fresno property the income is reduced over one-half, and then the destroying [105] of this property by fire*d* reduced the income we were getting by $2500.00 a year, and then by the condemnation proceeding by the city, making us tear the building down, it reduced the income. In 1924, $400.00 a month rental was coming from the Fresno property, and $200.00 is coming from it now. The reason for the loss in income there is just general conditions; we had a lease on at that time at $400.00 a month, and when that was up we could not get anybody to rent it again at that price. I would not say that it was exactly that time when the grapes were in such high demand, because the lease was on at that time, and, naturally, they wanted to fulfill their lease. I do not know exactly just what time the lease was put on; I know it was on

at the time that I came into the Trust Department, in 1924. We were receiving the income at that time. I think I have seen that lease. I saw it at one time, but I do not remember the terms of it exactly right now; all I remember is we were getting $400.00 a month, and I reported it to the government. I could not say whether the bank made the lease of whether it was on at the time, I would not want to say. The general condition of the real estate market would enter into the reason for the income being reduced there; there seem to be more stores than you can rent over there; we have vacant stores there now.

In 1924, after taking depreciation, that is net, after paying taxes—yes we took depreciation on this Fresno property in the $400.00 a month. I might say the deprecation for 1924 was $3320.00. After taking off that amount we have a net income, after paying trustee's fees, and taxes, and all expenses, of $9176.78. That is for the entire property in this State. [106]

$400.00 a month was the income during 1924 from Fresno. The income from this property in Oakland that was burned out during 1924, I just gave it approximately as $2500.00 a year, but I could give you the exact amount. In 1924 we got $2808.35. There is no new building on that property, it is still vacant. The new building was put up at 22nd and San Pablo; that was property condemned by the city, two pieces of property, 37th and San Pablo, and 22nd and San Pablo. *The* is no income from the place that burned down, it is a vacant lot. About the place where the property was condemned the income from that property during 1924 was at 37th and San Pablo we got $3025.00. On the new buildings there now, we are getting $5100.00 a year, but, of course, the mort-

gage is against that, and we have to pay interest on that. The other condemned property at 22nd and San Pablo in 1924 was earning $4535.00. We put a new building on that and we are now getting $4680.00; we are not getting very much more, and we have to pay interest on the mortgage, and increased taxes. There are some vacancies there right now, but we expect to get higher income. This income that I just gave you, that is exclusive of the taxes that we are paying, that is the rental, gross rental.

RE-DIRECT EXAMINATION.

THE COURT: You have introduced in evidence some deeds, I would like to understand what is meant by what is known as the trust estate? Is that all of the property, or is there property remaining the widow after these other transfers? [107]

MR. VAN FLEET: All of the real property, as I understand it, in the trust estate, was deeded to her by her husband, which is practically all of the estate, except $126,000.00, and that consisted mostly of bonds and securities.

THE COURT: I mean does this property that this witness is speaking of include also the property that was supposed to be deeded to her sons and daughter, a granddaughter, that is, the other heirs?

MR. VAN FLEET: You mean deeds outright?

THE COURT: Yes.

MR. VAN FLEET: No, there is certain property that they have that was deeded outright, a small amount of property.

THE COURT: I am asking if it is included in what he has called the trust estate.

MR. CARPENTER: There is $126,000.00 that did not go into the trust estate.

MR. VAN FLEET: Yes.

THE COURT: Am I correct in understanding that the deeds you offered in evidence include the conveyances from the mother to the children?

MR. VAN FLEET: No, those deeds have not been offered in evidence. The deeds that are offered in evidence are the deeds that the husband made to the wife, and I also offered in evidence the deed of trust.

THE COURT: I did not know whether there was embodied in the trust also the conveyances to the children.

MR. VAN FLEET: No.

THE COURT: That is not part of the trust?

MR. VAN FLEET: No. [108]

GEORGE G. MacKINNON, recalled for the Defendants, testified as follows:

I received a check from the government for a portion of the refund. I endorsed it and turned it over to my mother. The property included in that deed of trust was all of the property which my father deeded to my mother before his death, except possibly $75,000 to $100,000 worth, which he deeded to the three children probably a year after his death. That was unimproved property that had no improvements on. It was situated in Alameda County and Fresno County, and there were a few small pieces of not much value in Los Angeles County.

MR. VAN FLEET: At this time, if your Honor please, I have these defenses that I call your Honor's

attention, to which really involve questions of law, but I want to complete my record, the defense that a determination of the Commissioner of Internal Revenue under which they made a re-audit of this property, and a review of the property, and determination that the claim for refund should be allowed,—the defense that that was final, and that on the question of mistake, there never having been a re-assessment within the four years provided by the statute, that there is not any mistake upon which they can sue. Simply to clear the record on that I want to offer in evidence that determination of the Internal Revenue Department, for the purpose of its form. Of course, it is admitted in the pleadings, but the form is what we rely upon to show that there was a final determination and agreement by the government, and this letter of August 3, 1925, of George G. MacKinnon, as to this refund. [109]

THE COURT: Hasn't that heretofore been offered and ruled upon?

MR. VAN FLEET: Yes, but you excluded that particular letter, for the reason that it was admitted by the pleadings.

MR. CARPENTER: I wish to object to the offer upon the ground that I thought that it was understood with counsel that all of the defenses, with the exception of the defence of equitable estoppel, and that the transfer was made in contemplation of death were decided upon by Judge Kerrigan, and that that would be the ruling of the case, in so far as counsel was concerned. However, I am ready to argue those matters. They are purely questions of law.

THE COURT: As I understand, counsel merely wants to preserve the record in the case. The objec-

tion will be sustained. I don't know that you completed the forming of your objection.

MR. CARPENTER: That is all right, as long as it was sustained.

MR. VAN FLEET: I take an exception, if your Honor please.

THE COURT: To preserve that in the record you had better have it identified in some way.

MR. VAN FLEET: I offer in evidence a letter of August 3, 1925, to George G. MacKinnon, and others, joint administrators of the Estate of William H. MacKinnon, deceased, signed by E. H. Blair, Commissioner of Internal Revenue, and identified as U. S. Exhibit No. 5, already in this case. It was admitted in that equity suit. For the purpose of my defense No. 3, and also my defense No. 4.

MR. CARPENTER: I object to it on the ground that it is admitted by the pleadings. Counsel came in with an [110] answer and admitted—

THE COURT: You do not need to argue it—

MR. CARPENTER: For that reason I object to it; it is merely burdening the record.

MR. VAN FLEET: I am offering it for the purpose of these defenses.

THE COURT: The objection is sustained.

MR. VAN FLEET: Exception.

For the same purpose I offer in evidence the notice of the adjustment of the claim for refund, which was received on November 2 by the heirs, and it is identified already as U. S. Exhibit No. 4, in this case, for the same purpose, to show that there was a final adjustment of the claim. That is my reason for offering it.

MR. CARPENTER: The same objection.

THE COURT: The objection will be sustained.

MR. VAN FLEET: Exception.

MR. VAN FLEET: I offer the opinion of the Attorney General of the United States, approved by the Secretary of the Treasury, under date of July 10, 1926, stating that the question of State tax be carried to the Supreme Court of the United States.

MR. CARPENTER: I assign counsel's argument as error, I take exception to that.

MR. VAN FLEET: I have a right to make my offer.

THE COURT: The Court understands what the offer is. The objection will be sustained.

MR. VAN FLEET: Exception. That is all.

MR. CARPENTER: If your Honor please, I wish to move at this time that all of the testimony as to the equitable estoppel be stricken, on the ground that I urged this morning, first, that the essential element that is necessary as [111] a matter of law cannot be shown, cannot be established here, and, second, that an additional essential element, that of damage, has not been proved. For that reason I move that all of the testimony be stricken as to that particular defense.

MR. VAN FLEET: I have the authorities here, if your Honor please, if you want to hear argument on the question.

THE COURT: I am going to excuse the jury for a few minutes and let you present that question.

(Thereupon the jury was excused and the point argued by counsel.)

The Court is of the opinion in this matter of estoppel that all of the evidence introduced in support of estoppel, giving it its strongest effect, is not sufficient to

establish an estoppel, and, for that reason, the Court will sustain the motion to strike, and will instruct the jury to disregard that evidence, and not to consider that portion of the defense relating to estoppel. This action will be taken in the presence of the jury, and you can preserve your record at that time, or you can take your exception now.

MR. VAN FLEET: I will take my exception now.

(After further argument.)

MR. CARPENTER: In view of your Honor's statement, I make a request that the complaint be considered amended so as to conform to the proof, and that the prayer of the complaint be amended to pray for judgment against the defendant, Mrs. Frances MacKinnon Pusey, only for the full amount, together with interest from the date that the checks were received by the defendant.

THE COURT: The request to amend will be granted. [112]

BERNARD KAUFMAN, called for the plaintiff in rebuttal; being first duly sworn, testified:

I am duly registered and licensed to practice medicine in the State of California. I am practicing medicine at the present time. I specialize in diseases of the heart. My education in that respect has been a period of postgraduate study in Europe, that is, at London, Paris and Vienna, over a period of six years. Prior to that time I practiced medicine in California, from 1909 to 1921. I held honorary positions in Europe in my work there. I was at one time vice-president of the American Medical Association in Vienna for one term, and two terms president of the American Medical Association in Vienna. During my

course of studies over there I had occasion to study diseases of the brain in connection with heart trouble.

MR. CARPENTER: Q. Doctor, will you give me the definition of fatty degeneration of the heart?

MR. VAN FLEET: I object to that as immaterial, irrelevant, and incompetent. There is no question in this case in regard to fatty degeneration of the heart.

MR. CARPENTER: I believe that counsel is mistaken in that respect. I will read the testimony of Dr. Shannon. (Reads.)

THE COURT: I think the objection goes to the weight, rather than the competency of the testimony. The objection will be overruled and an exception may be noted.

THE WITNESS: A. That is a diseased condition of the heart muscles, in which the normal constituents of the muscle fibres have undergone changes resulting in the development of fatty globules. Meaning that instead of the muscles of the heart being normal, that the muscles had undergone [113] chemical changes in which fatty substances developed within the muscle fibres, themselves.

MR. CARPENTER: Q. What are the symptoms of that disease?

MR. VAN FLEET: To which we make the same objection.

THE COURT: The objection will be overruled.

MR. VAN FLEET: Exception.

THE WITNESS: A. The symptoms can range from practically nothing up until the most marked conditions, for example, a person may, in the early stages of it, notice nothing other than a sense of oppression in the chest, a discomfort in the chest, or

he may notice at times, not constantly, but at times, the recurrence of such effects or signs of discomfort; then at other times he may notice a shortness of breath recurring at periods, interspersed with periods of perfect freedom from shortness of breath; such shortness of breath might occur at one period, under certain physical effort, and not at other physical efforts, or he may have definite pain, or he may have disturbance of digestion, or he may have swelling in his limbs, or he finally might have sudden death.

MR. CARPENTER: Q. Now, myocarditis, what is the definition of that?

MR. VAN FLEET: I object to that, there is no evidence of myocarditis in this case.

MR. CARPENTER: Your own doctor did on cross-examination.

MR. VAN FLEET: He gave you a definition, but he said he did not think it myocarditis.

MR. CARPENTER: He did not say anything of the kind.

THE COURT: The objection is overruled.

MR. VAN FLEET: Exception. [114]

THE WITNESS: A. Myocarditis is a pathological condition in the heart muscles as a result of a chronic inflammatory process, either within the heart muscles or the tissues surrounding the heart muscles. The symptoms are practically similar to those of fatty degeneration, both in respect of their gradual onset and in respect to their outcome.

MR. CARPENTER: Q. Now, with either of those diseases, would a man who died as a result of either of them be apt to know, prior to his death, that death was impending within the reasonably distant future?

MR. VAN FLEET: I object to that upon the ground it is not a proper hypothetical question, not based upon any facts in the case.

THE COURT: The objection is overruled.

MR. VAN FLEET: Exception.

A. In general, yes.

MR. CARPENTER: Q. For how long prior to his death?

MR. VAN FLEET: We make the same objection.

THE COURT: Overruled.

MR. VAN FLEET: Exception.

A. That would depend upon many factors, first of all upon the man's age, the more elderly the man the more insistent would be that feeling that he would have as to the threat of death, or impending death; he would naturally have a fear, as most people have, that with increase in age, there is a fatty degeneration of the heart muscles connected with it, and he would get a fear of impending death as a result of that increase in age.

Q. Would it be apt to extend over a period of a month or two prior to his death, with a man say 63 years of age?

A. In my experience I would say over a longer period. [115]

MR. CARPENTER: That is all.

MR. VAN FLEET: That is all.

MR. CARPENTER: If your Honor please, at this time I wish to move for a directed verdict on defendants' counter-claim in favor of the government.

THE COURT: The motion will be denied.

MR. CARPENTER: May I have an exception to the ruling?

THE COURT: Yes.

MR. CARPENTER: For the purpose of the record, I also move for a directed verdict in favor of the government on defendants' cause of action for money had and received.

THE COURT: The motion will be denied.

MR. CARPENTER: Exception.

One further motion; I move for a directed verdict on all of the issues in the case in favor of the plaintiff.

THE COURT: The motion will be denied.

MR. CARPENTER: Exception.

MR. VAN FLEET: At this time I wish to move for a directed verdict, first, on my second defense to the amended complaint here, that the amended complaint herein sets forth an entirely new, separate, and distinct cause of action from that set forth in the original complaint herein, and said cause of action is barred by subdivision (b) of Section 610 of the Revenue Act of 1928. That, of course, has already been passed upon by Judge Kerrigan.

I also move for a directed verdict upon the ground that there has only been on determination by the Commissioner of Internal Revenue, here, in refunding this money, and that that determination was final. That is my third defense. And there was never any assessment made within the four years [116] provided by Section 1322 of the Act of 1921, and any further determination is barred.

THE COURT: Denied.

MR. VAN FLEET: Exception.

I wish to move for a directed verdict against plaintiff upon the ground that the government, in this case, has not produced sufficient evidence to show that the defendants here have money which, in equity and good conscience, they should return to the government.

THE COURT: The motion will be denied.

MR. VAN FLEET: Exception.

I also wish to move for a directed verdict upon the ground that the evidence here shows that this transfer of the decedent William H. MacKinnon to his wife before his death was made in good faith, and not in contemplation of death, and took effect and enjoyment at once, and that there is no evidence on the part of the government contradicting that evidence, and there is really no evidence to go to the jury on, as a matter of law.

THE COURT: The motion will be denied.

MR. VAN FLEET: Exception.

I wish at this time to move for a directed verdict as to the defendants George G. MacKinnon, William H. MacKinnon, Jr., Frances MacKinnon Coit, and John S. Delancey, guardian of June MacKinnon Delancey, a minor; that there is no evidence here that they ever received money which, in equity and in good conscience, they should return to the government.

THE COURT: The latter motion will be granted. The motion for a directed verdict for all defendants other than Mrs. Pusey will be granted. [117]

MR. CARPENTER: Might I state the ground on which I based my motion for a directed verdict on the counterclaim? The ground is there is nothing in the record to show the value of the property or the tax on the property which was transferred in contemplation of death, as claimed by the government. That is, the defendants claim the property was not transferred in contemplation of death. In other words, there is no evidence here to show just exactly what the offset would be in the event that the defendants were entitled to recover on their counterclaim.

THE COURT: That motion relates to what we might call your first defense, with respect to the deed, does it not?

MR. CARPENTER: Yes.

THE COURT: The motion will be denied.

MR. CARPENTER: Exception.

THE COURT: At this time I think the record might show that the motion to strike the evidence with respect to the defense of estoppel is granted.

MR. VAN FLEET: To which I take an exception.

THE COURT: And the jury will be instructed to disregard that phase of the case.

CHARGE TO THE JURY.

THE COURT (orally): Gentlemen of the Jury: I will instruct you upon the law of the case. Generally, you are instructed that you are the sole judges of the evidence, and the credibility of the witnesses. The law you are to apply as given you by the court.

In determining the weight of the testimony and the credibility of the witnesses, you have a right to consider [118] the interest, if any, the witnesses may have in the result of the case, their appearance upon the witness stand, the manner in which they give their testimony. If you believe any witness has testified falsely upon any material matter, you have a right to reject all of the testimony of that witness, except as it may be corroborated by other credible testimony in the case.

In this case, two defenses have been set up, one of which relates to the matter of a conveyance, in view of impending death, concerning which I will instruct

you later. The other is in reference to a defense in the nature of an equitable estoppel. The court has heretofore determined as a matter of law, from the testimony upon that phase of the case, that the evidence was insufficient to go to the jury, and upon that matter you are instructed to disregard that element of the case. You are also instructed to disregard any evidence in any matter where the evidence, upon motion, has been stricken. You are also instructed that arguments by counsel upon the facts of the case are designed to aid the jury in weighing the testimony; however, you are instructed that those are mere matters of argument, and that your final determination must be based upon the evidence in the case, and upon the evidence alone.

You are instructed that by the provisions of an Act of Congress entitled "An Act to Provide Revenue, and for Other Purposes," approved February 24, 1919, and commonly known as the Revenue Act of 1918, a federal tax was payable on estates of deceased persons; that in pursuance of such statute, a tax levied on the Estate of William H. Mackinnon, who died January 16, 1921, was paid in the total sum of $13,359.85; that after such payment, and on or about [119] October 31, 1923, a claim for a refund in the amount of $9899.94 was made upon the ground, among others, that only one-half of the community property of the decedent and his wife should be included in the decedent's gross estate; that thereafter the Commissioner of Internal Revenue conceded the contention for refund upon the ground that only one-half of the said community property should be included in the gross estate, and allowed a refund of $9438.66, with interest thereon in the sum of $1848.44; that thereafter, and

on or about the 2nd day of November, 1925, there was paid to the several defendants upon such refunds a total amount of $11,287.10, one-half of which amount was paid directly to the defendant, Frances Mackinnon Pusey, the surviving widow of the decedent, and the remaining half in equal amounts by checks to the other four defendants, who endorsed said checks and delivered the same to the defendant Frances Mackinnon Pusey, who received the money paid thereon.

You are instructed that the total gross estate of the said William H. Mackinnon was subject to the estate tax, and that the refund payments were occasioned by a mistake of law, and that the plaintiff is entitled to recover such payments from the defendant, Frances Mackinnon Pusey as money had and received, unless you find from the evidence that the defendants have established their alleged separate defense and counterclaim as set up in their amended answer.

You are instructed that the Revenue Act of 1918 was applicable when the transfers involved in this case were made. Under the provisions of that law, a transfer of a material part of deceased's property made without a fair consideration in money or money's worth, if made within two years of his [120] death, is presumed to be made in contemplation of death, and is taxable. The undisputed evidence in this case shows that the decedent, William H. Mackinnon, made a transfer of the bulk of his property to his wife as a gift within the month preceding his death. I therefore instruct you that these transfers are presumed to have been made in contemplation of death, and are presumed to be taxable. The burden of proof is on the defendants to show the contrary.

I instruct you that the finding of the Commissioner of Internal Revenue on the amount of a tax is presumed to be correct, and the burden is upon the defendants to show that it is not correct.

You are instructed that the burden of proof in this case is upon the defendants to show that transfers of property, and each of them, made by William H. Mackinnon to his wife, were transfers not made by William H. Mackinnon in contemplation of death; and if the defendants are unable to prove that said transfers, and each of them, were not made in contemplation of death, your verdict on defendant's counterclaim should be for plaintiff.

If you find that William H. Mackinnon made the transfers in question in contemplation of his death, then your verdict should be for the plaintiff, and against the defendant, Frances MacKinnon Pusey, for $11,287.10, together with interest thereon at 7 per cent per annum from October 19, 1925, to the present time.

You are instructed that one of the defenses of the defendants herein is that the defendants are entitled to keep the money sued for by the government herein in equity and good conscience, for the reason that there was a bona fide transfer of the real property by the said William H. [121] Mackinnon, deceased, to his wife, Frances Mackinnon Pusey, defendant herein, before his death, to-wit, on or about the 15th day of December, 1920; that said transfer consisted of deeds of gift by said William H. Mackinnon, deceased, to his wife, for a valuable consideration, of real property situate in the County of Alameda, County of Fresno, County of Los Angeles, in the State of California; that said deeds of gift were made

in good faith, and not in contemplation of death, and were intended to take effect in possession and enjoyment immediately during the lifetime of the decedent, William H. Mackinnon.

The burden is upon the defendants to establish these facts. If you find from the evidence that these deeds of gift were made in good faith, and not in contemplation of death, and were intended to take effect in possession and enjoyment immediately during the lifetime of the decedent, then your verdict should be for the defendants in this case.

It becomes necessary to instruct you, before you can determine this case to your satisfaction, as to the meaning of the words, "in contemplation of death," as that phrase is used in the statute. The language referred to was not intended to include that general expectation of death which is the essential concomitant of the inherent knowledge of the inevitable termination of all life, and which is in the young and physically robust as in the aged and the infirm. A reasonable and just view of the law in question is that it is only where the transfer of property by gift is immediately and directly prompted by the expectation of death, that the property so transferred becomes amenable to the burden of the tax. In other words, it is only when contemplation of death is the motive, without which the convey- [122] *ance* would not be made, that a transfer may be subjected to the tax. The meaning is restricted to that state of mind which by reason of advance age, serious illness, or other producing cause, induces the conviction that death in the near future is to be anticipated. But if the transfer is made with other motives and for other causes, it is not taxable, no matter when made. A

transfer is made in contemplation of death if the expectation or anticipation of death in either the immediate or reasonably near future is the moving cause of the transfer.

You have been instructed that under the Revenue Act of 1918 any transfer of the decedent's property, as in the case at bar, made by the decedent, within two years prior to his death, is, unless shown to the contrary, presumed to have been made in contemplation of death. A transfer within that period raises a presumption that the gifts were made in contemplation of death. This is a presumption raised by the law in the absence of evidence of a convincing nature by the defendants herein. The only legal effect of this presumption is to cast upon the defendants herein the burden of proving by satisfactory evidence the contrary. When that is done, the presumption is at an end, and the question as to whether these deeds were made in contemplation of death is one for the jury to determine upon all the evidence. Therefore, if you determine upon all the evidence that these deeds were not made in contemplation of death, as I have defined it to you, your verdict should be for the defendants herein.

You are instructed that the fact, alone, that William H. Mackinnon died within a month of the transfer to his wife, is not proof that the transfer was made in contemplation of [123] death. In spite of that fact, he could still have given the property in good faith, and at a time when he had no expectation or anticipation in either the immediate or reasonably distant future.

In considering the evidence in this case to determine whether the transfers were made in contemplation of

death, you have a right to consider all of the facts that have been submitted to you by the various witnesses upon either side of the case; you may consider the age, the condition of health, and all such matters in evidence which may appeal to you in determining the one sole question which is finally submitted to you in this case: Were the transfers of the real property shown by the deeds offered in evidence at the time of their execution and delivery, made by the decedent in contemplation of death?

Two forms of verdict will be submitted to you. One form will read, "We, the jury, find against the defendant Frances MacKinnon Pusey and in favor of plaintiff in the sum of $11,287.10 with interest at 7 per cent per annum from the 2nd day of November, 1925, (blank) Foreman."

The other form of verdict will read, "We, the jury, find for the defendant in the above entitled case, (blank) Foreman."

When you have agreed upon a verdict, you will have one or the other of those forms signed by your foreman and returned into court. Twelve of your number is necessary to agree upon a verdict.

Those are all of the instructions. If counsel desire to take any exceptions they may do so at this time.

MR. VAN FLEET: If your Honor please, in order to complete the record, I, at this time, desire to except to [124] the particular part of the general charge given to the jury regarding equitable estoppel; that particular part of the charge in which your Honor instructed the jury that the refund was a mistake.

I also except to the failure of your Honor to give

defendant's instruction No. 1 and defendant's instruction No. 8.

MR. CARPENTER: Merely for the purpose of the record, plaintiff excepts to that portion of the instructions which related to a statement of the plaintiff being entitled to recover on the theory of money had and received, unless—we except to that portion of the instructions containing the words which follow, "Unless," on the ground that we claim there is not sufficient evidence here to establish the defense.

(The portion of said instruction referred to reads as follows: "Unless you find from the evidence that the defendants have established their alleged separate defense and counter claim as set up in their amended answer.")

We also wish to except to that portion of the instructions which relate to—were the deeds made in good faith, and not in contemplation of death—we except to the including of the words "good faith" for the reason, as we urege, that there was no question at issue as to whether these were made in good faith.

(The portion of said instruction referred to reads as follows: "If you find from the evidence that these deeds of gift were made in good faith, and not in contemplation of death, and were intended to take effect in possession and [125] enjoyment immediately during the lifetime of the decedent, then your verdict should be for the defendants in this case.")

We further except to that portion of the instructions which related to the definition of the phrase "in contemplation of death," particularly to that portion starting with the words that it is restricted to persons of advanced age.

(The portion of said instruction referred to reads

as follows: "The meaning is restricted to that state of mind which, by reason of advance age, serious illness, or other producing cause, induces the conviction that death in the near future is to be anticipated.")

We further wish to except to the failure to give the definition as set forth in plaintiff's proposed instruction No. 5.

(Plaintiff's Proposed Instruction No. 5, reads as follows: "For a transfer to be 'in contemplation of death,' it is not necessary that the transferrer be in fear of immediate death. The phrase 'transfer in contemplation of death' for the purpose of this case means, a transfer of property, the transferrer having in mind the general expectancy of death which ordinarily acuates one in the execution of his will.")

THE COURT: The exceptions may be noted. The jury may now retire.

(Thereupon the jury retired, and subsequently came into court with a verdict in favor of the defendants.)

[126]

ORDER APPROVING AND SETTLING BILL OF EXCEPTIONS.

The foregoing bill of exceptions is duly proposed and is correct in all respects, and is hereby approved, allowed and settled and made a part of their record herein, and said bill of exceptions may be used by either parties plaintiff or defendant, upon any appeal taken by either parties plaintiff or defendant.

Dated: February 28th, 1930.

FRANK H. NORCROSS,
United States District Judge.

[Title of Court and Cause.]

AFFIDAVIT OF SERVICE OF PLAINTIFF'S PROPOSED BILL OF EXCEPTIONS.

United States of America,
State and Northern District of California,
City and County of San Francisco.—ss.

MARIE L. DUGUID, being duly sworn, deposes and says: I am and was at the time of the service of plaintiff's proposed bill of exceptions, a citizen of the United States over the age of 21 years, and not a party to the within entitled action; I personally served the within proposed bill of exceptions on Carey Van Fleet, Esq., attorney for defendants herein on February 8, 1930, by delivering to and leaving with said Carey Van Fleet personally in the Mills Building, in the City and County of San Francisco, in the Southern Division of the Northern District of California, a true copy of said proposed bill of exceptions.

MARIE L. DUGUID.

Subscribed and sworn to before me this 10th day of February, 1930.

(Seal) J. A. SCHAERTZER,
Deputy Clerk, U. S. District Court.
Northern District of California.

Service of the within Proposed Bill of Exceptions by copy admitted this ..... day of February, 1930.

.....,
Attorneys for Defendants.

I protest against the filing of the within Bill as not being in time.

CAREY VAN FLEET,
Attorneys for Defendants.

Dated February 8, 1930.

[Endorsed]: Filed: February 10, 1930. [127]

[Title of Court and Cause.]

NOTICE OF MOTION.

To UNITED STATES OF AMERICA, plaintiff herein, and GEORGE J. HATFIELD, its attorney:—

You and each of you, will please take notice that on Monday, the 10th of February, 1930, at the hour of 10 o'clock a. m., or as soon thereafter as counsel can be heard, in the courtroom of the above-entitled court, in the Postoffice Building, at 7th and Mission Streets, in San Francisco, California, defendants herein, by their attorney, Carey Van Fleet, will move to set aside the order of the above court, entered on the 27th day of January, 1930, extending the time and the term within which to serve, file, settle and sign a bill of exceptions herein, upon the grounds set forth in the accompanying motion.

CAREY VAN FLEET,
Attorney for defendants.

[Title of Court and Cause.]

MOTION.

Now comes the defendants herein and move to set aside the order herein entered on the 27th day of January, 1930, extending the time and the term within which a bill of exceptions may be served, filed, settled and signed, upon the ground that said order was (1) inadvertently made; (2) without the consent of defendants, (3) without jurisdiction, (4) is violative of the rules of this court, (5) and of the ruling of the Supreme Court of the United States, and the Circuit Court of Appeals, and is null and void.

CAREY VAN FLEET,
Attorney for defendants. [128]

Rules and Authorities.

Rule 8 of this court;
Rule 32 of this court;
Rule 45 of this court;
O'Connel vs. *U. S.,* 142-148.
Manufacturers Products vs. *Butterworth-Judson Company,* 258 U. S., 365-369.
Cavana vs. *Addison Miller,* 9th Circuit, 18 Fed. 2nd, 279.
Anderson vs. *U. S.,* 9th Circuit, 269 Fed., 65.
Maryland Casualty Co. vs. *Citizens Nat. Bank,* 9th Circuit, 8 Fed. 2nd, 216, 218.
Due service and receipt of a copy of the within

Notice of Motion is hereby admitted this 4th day of February, 1930.

GEO. J. HATFIELD,
Attorney for U. S.

[Endorsed]: Filed Feb. 4, 1930. [129]

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Thursday, the 13th day of February, in the year of our Lord one thousand nine hundred and thirty.

PRESENT: the Honorable Frank H. Kerrigan, District Judge.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

FRANCES MacKINNON PUSEY, et al.,

Ordered that the motion of defendant to set aside order heretofore made, extending the time and Term within which Plaintiff might file Bill of Exception, be and the same is hereby denied.[130]

[Title of Court and Cause.]

NOTICE OF MOTION TO STRIKE BILL OF EXCEPTIONS.

To United States of America, plaintiff herein, and George J. Hatfield, its attorney:

You and each of you will please take notice that on Monday, the 17th day of February, 1930, at the hour of 10 o'clock a. m. or as soon thereafter as counsel can be heard in the Court room of the above-entitled court, in the Postoffice Building at 7th and Mission Streets, in San Francisco, California, defendants herein by their attorney, Carey Van Fleet, will move to strike from the files plaintiff's Proposed Bill of Exceptions filed on February 10th, 1930, upon the grounds set forth in the accompanying motion.

CAREY VAN FLEET,
Attorney for Defendants.

[Title of Court and Cause.]

MOTION TO STRIKE BILL OF EXCEPTIONS.

Now come the defendants herein and move to strike plaintiff's Proposed Bill of Exceptions from the files herein upon the grounds and for the reasons that said Proposed Bill of Exceptions were not presented and filed within the time and the term as provided by law or any valid extension thereof to-wit:

The judgment herein became final October 18, 1929,

Appeal therefrom allowed January 17th, 1930,

Term for settling bill of exceptions began October 1st, 1929, and expired January 1st, 1930. Rule 8.

By stipulation and order entered on October 14th, 1929, the time to settle the Bill of Exceptions was extended beyond [131] the term until January 29th, 1930,

No further order was made within the extended term, but on January 27th, 1930, without consent of the defendants a further order was made extending the July 1929 term until the March term 1930, within to settle the Bill of Exceptions.

This last order is void as the court has lost jurisdiction as both the term and the extension thereof under Rule 8 had expired, otherwise Rule 8 and Rule 32 are of no avail.

CAREY VAN FLEET,
Attorney for Defendants.

Due service and receipt of a copy of the within Notice of Motion, etc., is hereby admitted this 14th day of February, 1930.

GEO. J. HATFIELD.

[Endorsed]: Filed Feb. 14, 1930. [132]

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Monday, the 17th day of February, in the year of our Lord one thousand nine hundred and thirty.

PRESENT: The Honorable Frank H. Kerrigan, District Judge.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

FRANCES MACKINNON PUSEY, et al.,
Defendants.

After hearing Carey Van Fleet, Esq., attorney for defendant, it is ordered that motion of defendants to strike from files plaintiff's proposed bill of exceptions be denied and exception entered. [133]

[Title of Court and Cause.]

NOTICE OF PRESENTATION OF PROPOSED BILL OF EXCEPTIONS FOR SETTLEMENT.

To the defendants above named and to Carey Van Fleet, Esq., their attorney:

You, and each of you, will please take notice that on Tuesday, the 25th day of February, 1930, at the hour of 10:00 A. M., or as soon thereafter as counsel can be heard in the courtroom of the above entitled court, Post Office Building, 7th and Mission Streets, San Francisco, California, plaintiff will present its proposed bill of exceptions to the trial judge through the Honorable Frank H. Kerrigan for settlement.

Dated: February 19, 1930.

GEO. J. HATFIELD,
United States Attorney, Attorney for Plaintiff.

[Endorsed]: Filed Feb. 19, 1930. Service of the within Notice by copy admitted this 19th day of February, 1930.

CAREY VAN FLEET,
Attorney for Defendants.
WALTER B. MALING,
Clerk.
By R. M. GREEN,
Deputy Clerk. [134]

[Title of Court and Cause.]

NOTICE OF PROTEST AGAINST SETTLING, SIGNING AND CERTIFYING BILL OF EXCEPTIONS.

To United States of America, plaintiff herein, and George J. Hatfield, its attorney:

You and each of you will please take notice that on Tuesday, the 25th day of February, 1930, in the courtroom of the above entitled court at the hour of 10 o'clock a. m. or as soon thereafter as counsel can be heard, the defendants herein by their attorney, Carey Van Fleet, will protest against the settling, signing and certifying of the Bill of Exceptions in this case upon the grounds in the accompanying protest.

CAREY VAN FLEET,
Attorney for Defendants.

[Title of Court and Cause.]

PROTEST AGAINST SETTLING, SIGNING AND CERTIFYING BILL OF EXCEPTIONS.

Defendants, by their attorney, Carey Van Fleet, protest against the settling, signing and certifying of the Bill of Exceptions in this case upon the ground that the court has lost jurisdiction to settle, sign and certify said Bill, as the same was not presented during the term at which the judgment was entered or during any valid extension thereof and that all legal times,

periods and terms have expired for settling, signing and certifying the same.

Rule 8 of this court.

Rule 32 of this court.

Rule 45 of this court.

CAREY VAN FLEET,
Attorney for Defendants.

Receipt of a copy of the within Notice of Protest is hereby admitted this 19th days of February, 1930.

GEO. J. HATFIELD.

[Endorsed]: Filed Feb. 19, 1930. [135]

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Tuesday, the 25th day of February, in the year of our Lord one thousand nine hundred and thirty.

PRESENT: the Honorable Frank H. Kerrigan, District Judge.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

FRANCES MACKINNON PUSEY, et al.,
Defendants.

This case came on regularly this day for hearing of the application for the settlement of the Bill of

Exceptions upon Appeal herein and the Opposition, thereto. Chellis M. Carpenter, Assistant U. S. Attorney, appearing as attorney for the United States. Carey Van Fleet, Esquire, appearing as attorney for Defendants. After hearing Counsel, the Court ordered that said matters be and are ordered submitted to Hon. Frank H. Norcross for consideration and determination. Further ordered that the orders of this Court entered herein on February 10, 1930, February 13, and February 17, 1930, be and the same are hereby vacated, set aside and held for naught and that the matter therein involved, to-wit: Motion of defendants to set aside order extending time and Term within which Plaintiff might file Bill of Exceptions and motion of defendants to strike from files Plaintiff's proposed Bill of Exceptions—be and the same are hereby ordered submitted to the said Honorable Frank H. Norcross, for consideration and determination. [136]

[Title of Court and Cause.]

ORDER DENYING DEFENDANT'S MOTIONS TO SET ASIDE ORDER EXTENDING TIME FOR BILL OF EXCEPTIONS; TO STRIKE BILL OF EXCEPTIONS; AND OVERRULING PROTEST AGAINST SETTLING, SIGNING AND CERTIFYING OF BILL OF EXCEPTIONS.

Defendant's motion, filed February 4, 1930, to set aside the order herein entered on the 27th day of January, 1930, extending the time and term within

which a Bill of Exceptions may be served, filed, settled and signed; and defendants' motion, filed February 14th, 1930, to strike plaintiff's proposed Bill of Exceptions from the files; and defendants' protest against the settling, signing and certifying of the Bill of Exceptions in this cause, having been submitted to the Court for decision, and the Court being fully advised in the premises,

It Is Ordered that each of said motions be, and the same hereby is, denied; and that said protest be, and the same hereby is, overruled.

Dated this 28th day of February, 1930.

FRANK H. NORCROSS,
District Judge.

[Endorsed]: Filed March 3, 1930. [137]

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Tuesday, the 11th day of March, in the year of our Lord one thousand nine hundred and thirty.

PRESENT: the Honorable Frank H. Kerrigan, District Judge.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

FRANCES MACKINNON PUSEY, et al.,
Defendants.

On motion of Carey Van Fleet, Esq., attorney for defendant, it is ordered that an exception be entered to the Order filed herein on March 3, 1930, denying defendants Motion to set aside Order extending time for Bill of Exceptions; to strike Bill of Exceptions and overruling protest against settlement, signing and certifying of Bill of Exceptions. [138]

[Title of Court and Cause.]

PETITION FOR APPEAL.

The United States of America, plaintiff in the above entitled action, by and through Geo. J. Hatfield, United States Attorney for the Northern District of California, feeling itself aggrieved by the judgment entered on the 18th day of the October, 1929, in the above entitled proceedings, does hereby appeal from the said judgment to the Circuit Court of Appeals for the Ninth Circuit, and prays that its appeal may be allowed, and that a transcript of the record of proceedings and papers upon which said judgment was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit.

Dated: January 17, 1930.

GEO. J. HATFIELD,
United States Attorney, Attorney for Plaintiff.

[Endorsed]: Filed Jan. 17, 1930.

WALTER B. MALING,
Clerk. [139]

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS.

COMES NOW the United States of America, plaintiff in the above entitled action, being the appellant herein, by Geo. J. Hatfield, United States Attorney for the Northern District of California, and in connection with its petition for appeal herein and the allowance of the same, assigns the following errors which it avers occurred at the trial of said cause, and which were duly excepted to by it and upon which it relies to reverse the judgment herein:

I.

The counterclaim set forth in defendants' amended answer to plaintiff's amended complaint, does not state facts sufficient to constitute a counterclaim. [140]

II.

That the court has no jurisdiction of the subject matter of the claim set forth in defendants' amended answer to plaintiff's amended complaint as a counterclaim.

III.

The court erred in overruling the demurrer interposed by the plaintiff to the first, further and separate defense and counterclaim which defendants have attempted to set forth on Pages 3 and 4 of the amended answer to plaintiff's amended complaint.

IV.

The court erred in denying plaintiff's motion for directed or instructed verdict at the close of all the evidence in said cause, upon the following grounds, to-wit:

1. On the ground that the evidence in this case had not established a *prima facie* case of counterclaim and was legally insufficient to sustain a verdict, and

2. On the ground that the evidence in this case was such as a matter of law to entitle plaintiff to a directed verdict on all the issues in the case.

To which ruling of the court plaintiff duly and regularly excepted.

V.

The court erred in denying plaintiff's motion for a directed verdict on defendants' counterclaim upon the ground that the evidence in the case thereon had not established a *prima facie* case on counterclaim and was legally insufficient to sustain a verdict for the reason that no evidence was introduced showing that the claim set forth in [141] said counterclaim was ever presented to the accounting officers of the Treasury as required by Section 951 Revised Statutes (28 U. S. C. 774), and no evidence was offered to show that the defendants, or any of them, were, at the time of the trial, in possession of vouchers or other documents not before in their power to procure, and/or were prevented from exhibiting a claim for such credit at the Treasury by absence from the United States or for any other cause whatsoever; to which ruling of the court plaintiff duly and regularly excepted at the time of the trial herein.

VI.

The court erred in denying plaintiff's motion for a directed verdict at the close of all the evidence in said cause on plaintiff's cause of action for money had and received, on the ground that the evidence in this cause was such, as a matter of law, to entitle plaintiff to a verdict thereon; to which ruling of the court plaintiff duly and regularly excepted at the time of the trial herein.

VII.

The court erred in giving the last portion of the following instruction:

"You are instructed that the total gross estate of the said William H. Mackinnon was subject to the estate tax, and that the refund payments were occasioned by a mistake of law, and that the plaintiff is entitled to recover such payments from the defendant, Frances Mackinnon Pusey as money had and received, unless you find from the evidence that the defendants have established their alleged separate defense and counter-claim as set up in their amended answer."

beginning with the words, "unless you find" and reading as follows:

"unless you find from the evidence that the defendants have established their alleged [142] separate defense and counter claim as set up in their amended answer."

To which the plaintiff duly and regularly excepted at the time of the trial herein.

VIII.

The court erred in giving the last sentence of the following instruction:

"You are instructed that one of the defenses of the defendants herein is that the defendants are entitled to keep the money sued for by the Government herein in equity and good conscience, for the reason that there was a bona fide transfer of the real property by the said William H. Mackinnon, deceased, to his wife, Frances Mackinnon Pusey, defendant herein, before his death, to wit, on or about the 15th day of December, 1920; that said transfer consisted of deeds of gift by said William H. Mackinnon, deceased, to his wife, for a valuable consideration, of real property situate in the County of Alameda, County of Fresno, County Los Angeles, in the State of California; that said deeds of gift were made in good faith, and not in contemplation of death, and were intended to take effect in possession and enjoyment immediately during the lifetime of the decedent, William H. Mackinnon.

"The burden is upon the defendants to establish these facts. If you find from the evidence that these deeds of gift were made in good faith, and not in contemplation of death, and were intended to take effect in possession and enjoyment immediately during the lifetime of the decedent, then your verdict should be for the defendants in this case."

beginning with the words "If you find" and reading as follows:

"If you find from the evidence that these deeds of gift were made in good faith, and not in contemplation of death, and were intended to take effect in possession and enjoyment immediately during the lifetime of the decedent, then your verdict should be for the defendants in this case."

To which the plaintiff duly and regularly excepted at the [143] time of the trial herein.

IX.

The court erred in giving the last portion of the following instruction:

"It becomes necessary to instruct you, before you can determine this case to your satisfaction, as to the meaning of the words 'in contemplation of death', as that phrase is used in the statute. The language referred to was not intended to include that general expectation of death which is the essential concomitant of the inherent knowledge of the inevitable termination of all life, and which is in the young and physically robust as in the aged and the infirm. A reasonable and just view of the law in question is that it is only where the transfer of property by gift is immediately and directly prompted by the expectation of death, that the property so transferred becomes amenable to the burden of the tax. In other words, it is only when contemplation of death is the motive, without which the conveyance would not be made, that a transfer may be subjected to the tax. The meaning is restricted to that state of mind which, by reason of advance age, serious illness, or other producing cause, induces the conviction that death in the near future is to be anticipated. But if the transfer is made with other motives and for other causes, it is not taxable, no matter when made. A transfer is made in contemplation of death if the expectation or anticipation of death in either the immediate or reasonably near future is the moving cause of the transfer."

beginning with the words "The meaning is restricted" and reading as follows:

"The meaning is restricted to that state of mind

which, by reason of advance age, serious illness, or other producing cause, induces the conviction that death in the near future is to be anticipated."

To which the plaintiff duly and regularly excepted at the time of the trial herein. [144]

X.

The court erred in refusing to give the following instruction to the jury, which said instruction was duly presented to the court as "Plaintiff's Proposed Instruction No. 5";

"For a transfer to be 'in contemplation of death' it is not necessary that the transferror be in fear of immediate death.

"The phrase 'transfer in contemplation of death' for the purpose of this case means, a transfer of property, the transferrer having in mind the general expectancy of death which ordinarily actuates one in the execution of his will."

To which the plaintiff duly and regularly excepted at the time of the trial herein.

XI.

The court erred in overruling the objection of plaintiff to the following questions propounded to the witness George G. Mackinnon by attorney for defendants:

"MR. VAN FLEET: Q. Well, at that time, knowing the date when he paid off the mortgage,—do you remember that date?

"A. I don't recall it—it was sometime during the year—the latter part—I think it was in November, 1919.

"Q. Well, what did he state to you at that time and who was present?

"A. I don't think anybody was present, except he and I.

"Q. And what did he state to you at that time?

"A. That as soon as he got all the properties clear—

"MR. CARPENTER: Just a moment. I object to that on the ground that it is too far remote in point of time to show the condition of the testator's mind.

"MR. VAN FLEET: Well, it was in November, 1919.

"MR. CARPENTER: And he died in 1921.

"MR. VAN FLEET: He died in 1921, yes. [145]

"MR. CARPENTER: And the transfer was made a month before his death.

"MR. VAN FLEET: And we can show the course of his mind, of his intention, in the testator's mind for several years back, under the authorities.

"MR. CARPENTER: I take issue with you on that.

"THE COURT: Objection overruled.

"MR. CARPENTER: Exception.

MR. VAN FLEET: Q. And what was that conversation?

A. And he intended to deed certain properties to my mother.

MR. CARPENTER: I object and ask that the answer be stricken out, and I ask that the witness be instructed to state just what the conversation was, not give his conclusion of what it was.

THE COURT: The answer may go out; and state the conversation, as near as you can recall it, just what he said.

THE WITNESS: Well, he told me that he intended, after certain things were cleaned up, to deed certain properties to my mother. He had been telling me that for ten years.

MR. VAN FLEET: That last may go out, if your Honor please.

THE COURT: With respect to telling him that for ten years, that may go out, and the jury is instructed to disregard it."

XII.

The court erred in overruling the objection of plaintiff to the following testimony by the witness George G. Mackinnon, relative to the state of mind of the deceased subsequent to December 15, 1920, (at which time the transfer in issue was made):

"MR. VAN FLEET: Was he complaining of his health at that time?

A. He never said anything to me about his health. [146]

Q. At about that time were you contemplating a trip with your father?

A. Yes, I was contemplating a trip. He wanted me to take him on a trip.

Q. Where to? A. Fresno.

Q. And just what time was this?

A. I was playing cards with him on Saturday night, on the 15th day of January up to half past 11 at night and then he made arrangements for me to take him to Fresno on the following Monday.

MR. CARPENTER: If your Honor please, I ask that the testimony as to his state of mind subsequent to December 15, 1920, be stricken. The

witness is now testifying to the deceased's actions in January, just prior to his death.

MR. VAN FLEET: Well, under the authorities, if your Honor please, the declarations of the donor and the circumstances surrounding the gifts can be made both before and after the transfer. They are both admissible, both before and after the transfer.

THE COURT: That is more with respect to his health rather than state of mind at that time. The objection will be overruled.

MR. CARPENTER: Exception."

XIII.

The court erred in overruling the objection of plaintiff to the following testimony by the witness John S. De Lancey, relative to the state of mind of the deceased subsequent to December 15, 1920, (at which time the transfer in issue was made):

"MR. VAN FLEET: Q. Where was that and when and who was present?

A. When he acknowledged the deeds, I don't remember the date. I was present and he says, 'John, I am now a pauper'—

MR. CARPENTER: Just a minute. If you are asking for the conversation that took place I would like to urge the objection I made formerly, that it is coming after the transfer was actually made, that it is inadmissible to show the state of mind of the testator at [147] the time the transfer was actually made.

THE COURT: The objection is overruled.

MR. CARPENTER: Exception.

MR. VAN FLEET: You may answer.

A. He says, 'I am now a pauper. I have got to

depend upon'—I forget just what he called Mrs. Mackinnon, but he was speaking of his wife,—'I have got to depend on her for anything I want from now on.'

Q. Did you have any conversation with him just before he died? A. Yes.

Q. What was that?

MR. CARPENTER: Just a minute; who was present and when did it take place?

MR. VAN FLEET: Q. Just before he died?

A. There was a nurse present; she was in and out of the room. I think the nurse was out of the room and Mrs. Mackinnon, Mrs. Pusey, now, was in and out of the room. I was talking to him. That was the morning of his death, and that is all that was present.

Q. Where was he at that time?

A. He was sitting in a chair in his room and talking to me.

Q. And did he say anything at that time about an impending demise or that he was expecting to die?

A. No; he was not feeling well, and he stated he would like to see another doctor and I told him that I would make an arrangement to take him to the city the following day, or would make an arrangement to have Dr. Moffatt of San Francisco come and see him.

MR. CARPENTER: If your Honor please, may it be stipulated that my objection—otherwise I would have made an objection to this question—that my objection to all the declarations and conversations had with the testator after the alleged transaction was made, be considered and deemed to be objections to all the rest of the line of testimony in this same case?

THE COURT: It may be so understood and an exception noted without further objection." [148]

XIV.

The court erred in overruling the objection of plaintiff to the following testimony by the witness J. M. Shannon, relative to the state of mind of the deceased subsequent to December 15, 1920, (at which time the transfer in issue was made):

"MR. VAN FLEET: Q. Did you see Mr. Mackinnon near or about the time he died; he died in January, 1921.

A. I think the last time I saw him was on the—well, as I remember, on the 24th of December.

Q. What was his condition at that time?

A. He was well with the exception of a cold that he complained of at that time.

MR. CARPENTER: Q. What time was that?

MR. VAN FLEET: Q. What date did you say that was, about?

A. Well, as I remember, it was the 24th of December.

Q. The day before Christmas? A. Yes.

Q. Did you have any conversation with him at that time with regard to his business affairs?

A. I think not; I don't remember.

Q. Did you have any conversation during that time in regard to the disposal of his property; and state about when it was and where it was?

MR. CARPENTER: If you did.

A. Previous to that, I couldn't say the exact date, but a few days—he told me he had deeded his property—

MR. CARPENTER: Just a moment. May we have the place and who was present.

THE WITNESS: It was at his home. I don't know that anyone was present; I don't recall that anyone was present.

MR. VAN FLEET: Q. Just what was that conversation?

A. He told me that he had deeded his property to Mrs. Mackinnon and he told me that he had made a deed,—he called it a blanket deed. He said his lawyers had said it was no good, but he said 'the lawyers didn't know it all,' kind of joshing." [149] To which ruling of the court the plaintiff duly and regularly excepted.

XV.

The court erred in overruling the objection of plaintiff to the following testimony by the witness William H. Mackinnon, relative to the state of mind of the deceased subsequent to December 15, 1920, (at which time the transfer in issue was made):

"MR. VAN FLEET: Q. At that time, when you saw him four days before his death, did he say anything in regard to his property?

A. He told me that he had deeded all of his real property to my mother.

Q. Just what conversation did you have with him?

MR. CARPENTER: How many days before—what day of the four days?

A. I returned on the 12th of January to my home, and after I had talked with him for possibly half an hour or so he said, 'Did you know that I had deeded

my property to your mother?' And I said, yes, I had heard about it while I was in the hospital.

MR. VAN FLEET: Q. At that time did you have any talk with him about his illness?

A. Yes, I had quite a conversation with him about his illness.

Q. What did he say, and who was present, if anyone?

A. There was no one present, as the conversation was principally with reference to my opinions of doctors, whether I thought he was ill, or not, seriously ill.

Q. State the substance of the conversation?

A. He first asked me what I thought of doctors, and I told him that my experience with doctors had not been very satisfactory, and he said, 'Well, they can make a mistake once in a while,' and I said I thought so. 'Well,' he said, 'they want me to make a trip down to Fresno.' He said, 'I am very anxious to go. Do you think you can go down with me, go next week?' That was the early part of the week when he suggested it to me. I told him I thought I could. [150] Then he said, 'Well, how do I look to you?' And I said, 'You look all right to me,' something to that effect, I can't recall any more."

To which ruling of the court the plaintiff duly and regularly excepted.

XVI.

The court erred in overruling the objection of plaintiff to the following testimony by the witness William H. Mackinnon, relative to contesting the transfer in issue:

"MR. VAN FLEET: Q. Did you contest the transfer of this property to your mother?

MR. CARPENTER: Objected to on the ground that the records of probate are the best evidence.

THE COURT: I think that is true.

MR. VAN FLEET: If your Honor please, I simply wish to show—

THE COURT: I will permit that to be answered, because it will save some time. Exception. I will permit the witness to answer, notwithstanding the records are the best evidence, unless there is some further objection to it.

MR. CARPENTER: The further objection to it that it is entirely immaterial, not within the issues of this case, whether this man contested the proceedings in the probate court, that has not got anything to do with the question of whether or not the property was transferred in contemplation of death.

THE COURT: The objection will be overruled and an exception noted.

MR. CARPENTER: Exception.

THE WITNESS: A. No, I did not."

XVII.

The District Court erred in entering judgment on the verdict herein because the evidence adduced at the [151] trial of this action was, as a matter of law, legally insufficient to sustain the verdict or judgment.

WHEREFORE, plaintiff prays that its appeal be allowed, that this assignment of errors be made a part of the record in its cause, and that upon hearing of its appeal the errors complained of be corrected and

the said judgment of October 18, 1929, may be reversed, annulled and held for naught; and further that it be adjudged and decreed that the said plaintiff and appellant have the relief prayed for in its amended complaint, and such other relief as may be proper in the premises.

(Sgd.) GEO. J. HATFIELD,
United States Attorney, Attorney for Plaintiff and Appellant.

[Endorsed]: Filed Jan. 17, 1930.

WALTER B. MALING,
Clerk. [152]

[Title of Court and Cause.]

ORDER ALLOWING APPEAL AND THAT NO SUPERSEDEAS AND/OR COST BOND BE REQUIRED.

Upon reading the petition for appeal of the plaintiff and appellant herein, IT IS HEREBY ORDERED that an appeal to the Circuit Court of Appeals for the Ninth Circuit from the judgment heretofore filed and entered herein be, and the same is hereby allowed, and that a certified transcript of the record, testimony, exhibits, stipulations and all proceedings be forthwith transmitted to the said Circuit Court of Appeals for the Ninth Circuit.

IT IS FURTHER ORDERED that no bond on this appeal, or supersedeas bond, or bond for costs

or damages shall be required to be given or filed.

Dated: January 17th, 1930.

FRANK H. KERRIGAN,
United States District Judge.

[Endorsed]: Filed Jan. 17, 1930.

WALTER B. MALING,
Clerk. [153]

[Title of Court and Cause.]

PRAECIPE.

To the Clerk of Said Court:
Sir:

Please prepare a transcript of the record in this case to be filed in the office of the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, under the appeal heretofore sued out and perfected to said Court, and include in said transcript the following pleadings, proceedings and papers on file, to-wit:

1. Original Complaint.
2. Notice of motion and motion to quash filed February 16, 1927; and affidavit of John S. Delancey and affidavit of William H. Mackinnon, Jr.
3. Minute order made on said motion to quash.
4. Notice of and motion to dismiss filed March 2, 1927;
5. Minute order made on motion to dismiss.
6. Original subpœna ad respondendum and return thereon.

7. Alias subpœna ad respondendum and return thereon.

8. Order transferring to law side.

9. Amended complaint.

10. Amended answer to amended complaint.

11. Demurrer to amended answer to amended complaint.

12. Order overruling demurrer to amended answer.

13. Verdict.

14. Judgment.

15. Petition for appeal.

16. Order allowing appeal and that no supersedeas and/or cost bond be required.

17. Assignment of errors and original citation on appeal.

18. Bill of Exceptions.

19. Stipulation and order extending time and term to file bill of exceptions (filed October 14, 1929);

20. Order of January 27, 1930, extending time to file bill of exceptions.

21. Stipulation for sending exhibits and certain moving papers and orders thereon to Circuit Court of Appeals, filed March 21, 1930.

22. This præcipe.

GEO. J. HATFIELD,
United States Attorney, Attorney for Plaintiff.

Service of the within Præcipe by copy admitted this 21st day of March, 1930.

CAREY VAN FLEET,
Attorney for Defendants.

[Endorsed]: Filed March 21, 1930.

WALTER B. MALING,
Clerk. [154]

CERTIFICATE OF CLERK, U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD.

I, WALTER B. MALING, Clerk of the District Court of the United States, in and for the Northern District of California, do hereby certify the foregoing 154 pages, numbered from 1 to 154, inclusive, to be a full, true and correct copy of the record and proceedings as enumerated in the præcipe for record on appeal, as the same remain on file and of record in the above-entitled suit, in the office of the Clerk of said Court, and that the same constitutes the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the cost of the foregoing transcript of record is $51.75; that said amount will be charged against the United States in my next quarterly account and the original citation issued in said suit is hereto annexed.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court this 16th day of April, A. D. 1930.

(Seal) WALTER B. MALING,
Clerk United States District Court for the Northern District of California. [155]

[Title of Court and Cause.]

CITATION ON APPEAL.

United States of America, ss:
The President of the United States of America:

To Frances Mackinnon Pusey, George G. Mackinnon, William H. Mackinnon, Jr., Frances Mackinnon Coit, and John S. Delancey, Guardian of June Mackinnon Delancey, a Minor,

Greeting:

YOU ARE HEREBY CITED AND ADMONISHED to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the Clerk's Office of the United States District Court for the Northern District of California, wherein the United States of America is appellant, and you are appellees, to show cause, if any there be, why the decree or judgment rendered against the said appellant, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable Frank H. Kerrigan, United States District Judge for the Northern District of California, this 17th day of January, A. D. 1930.

FRANK H. KERRIGAN,
United States District Judge.

Receipt of the within Citation by copy this 18th day of January, 1930.

CAREY VAN FLEET,
Attorney for Respondent.

[Endorsed]: Filed January 18, 1930.

WALTER B. MALING,
Clerk.

By R. M. Green,
Deputy Clerk. [156]

[Endorsed]: No. 6126. United States Circuit Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Frances Mackinnon Pusey, George G. Mackinnon, William H. Mackinnon, Jr., Frances Mackinnon Coit, and John S. Delancey, Guardian of John Mackinnon Delancey, a Minor, Appellees. Transcript of the Record. Upon Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed April 17, 1930.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.